THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5790 (S.C. Ct. App. filed Jan. 13, 2021)
Appellate Case No. 2021-000429

James Provins, Employee/Deceased,
Debra Provins, Alleged Dependent, Claimants, ...Petitioners,

v.

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

RETURN TO PETITION
FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTION PRESENTED

I. Have Petitioners stated any grounds upon which this Court should grant a writ of certiorari?

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. (*See* R. p. 23). Spirit Construction Services, Inc. and its carrier, Insurance Company of the State of PA, (collectively "Respondents"), initially denied Claimant sustained an injury by accident arising out of and in the course of his employment. Id. A compensability hearing was held before Commissioner Gene McCaskill on August 14, 2012, and on September 7, 2012, Commissioner McCaskill issued a Decision and Order finding Decedent sustained a compensable injury to his right shoulder. (R. pp. 50-61). Respondents timely appealed to the South Carolina Workers' Compensation Commission Appellate Panel, and on February 27, 2013, the Appellate Panel issued an order affirming the decision of Commissioner McCaskill. (R. pp. 40-48). Thereafter, Respondents began providing Decedent with temporary total disability benefits and medical treatment for his right shoulder, to include a shoulder surgery.[1]

During the course of medical treatment, Decedent filed a Motion to Compel (additional surgery). (R. pp. 59-61). 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 the immediate causes of death. (R. p. 1021)

[1] Since Decedent resided in Louisville, Kentucky, Respondents authorized treatment with Dr. Frank Bonnarens of Orthopaedic Associates of Kentuckiana. (*See* R. p. 489).

Decedent's Widow, Debra Provins (hereinafter "Petitioner"), filed a Form 50 on November 18, 2014, seeking entitlement to benefits pursuant to S.C. Code Ann. § 42-9-280. (*See* R. pp. 23 & 71). Prior to the scheduled hearing of January 22, 2015, with Commissioner Barden, and after a pre-hearing conference, Petition withdrew the Form 50. (*See* R. p. 23). Petitioner refiled the Form 50 on March 18, 2015, this time seeking permanent and total disability, as well. Id. Subsequently, Petitioner filed an Amended Form 50 on April 13, 2015, and additionally filed a Form 52 Death Claim on April 15, 2015. Id. Respondents responded with a Form 53, denying that Decedent had sustained a compensable death. Id. A hearing was scheduled before Commissioner T. Scott Beck on October 21, 2015, but following a pre-trial conference, Petitioner withdrew the Forms 50 and 52. Id.

Petitioner refiled *only* the Form 52 Death Claim on January 25, 2016. Id. A hearing was scheduled before Commissioner Melody James on July 26, 2016. Id. 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. (R. pp. 23-24).

A hearing was subsequently scheduled and held before Commissioner R. Michael Campbell, II ("the Single Commissioner"), on December 5, 2016, in Anderson, South Carolina. (*See* R. p. 19). At the hearing of December 5, 2016, counsel for Petitioner asserted that Decedent's death resulted from "the bad faith denial of the claim which prolonged his treatment..." (R. p. 252, lines 2-4). Specifically, Petitioner's position was that in order to deal with his pain, Decedent became dependent on alcohol, which eventually lead to his death. (R. p. 253, lines 22-25). 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. (R. p. 253, lines 1-10). 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. Id. 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. (R. p. 254, lines 11-17). Specifically, Decedent had a significant pre-existing alcohol issue and was an alcoholic prior to the work injury. (R. p. 254, lines 1-2). 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. (R. p. 255, lines 5-9).

Furthermore, Respondents raised a Capers[2] 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–p. 255, line 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)

[2] Capers v. Flautt, 305 S.C. 254, 407 S.E.2d 248 (Ct. App. 1991).

On March 20, 2017, Petitioner timely appealed the Single Commissioner's Decision and Order via filing of a Form 30, Request for Commission Review. (R. pp. 155-157). Oral arguments were held before an Appellate Panel of the South Carolina Workers' Compensation Commission ("the Commission") on November 14, 2017. (*See* R. p. 310). On January 11, 2018, the Commission unanimously affirmed the Order of the Single Commissioner. (R. pp. 1-15). Petitioner timely filed a Notice of Appeal to the Court of Appeals. (R. pp. 169-171). [3]

The Court of Appeals heard oral arguments on September 22, 2020, and on January 13, 2021, the Court of Appeals issued its opinion affirming the Commission's decision. Petitioner timely filed a Petition for Rehearing, which was denied by the Court of Appeals on March 26, 2021. Petitioner subsequently filed a Petition for Writ of Certiorari with this Court on April 27, 2021.

ARGUMENT

I.

PETITIONER STATES NO GROUNDS UPON WHICH THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

Rule 242 of the South Carolina Appellate Court Rules sets forth the five main reasons that the Supreme Court will grant a writ of certiorari. None of those reasons apply to the instant case.[4] However, in response to Petitioner's questions presented and related arguments, Respondents offer the following arguments in support of their position that this Honorable Court should not issue a writ of certiorari.

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[3] 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.

[4] This case does not involve a dissent in the decision of the Court of Appeals, a substantial constitutional issue, or a federal question. Respondents submit that reasons (2), (4), and (5) as set forth in Rule 242 are unquestionably inapplicable. Respondents further submit that this case does not present a novel question of law nor does the decision of the Court of Appeals conflict with a prior decision of the Supreme Court as argued hereinafter.

A. Decedent's alcoholism was not the proximate cause of his work injury.

It is undisputed that Decedent's intoxication or alcoholism was not the proximate cause of his work-injury on January 24, 2012. In fact, at the initial compensability hearing in this matter, Respondents never asserted S.C. Code § 42-9-60 (intoxication) as a defense. Compensability of Decedent's January 24, 2012 right shoulder injury is currently not at issue. Decedent sustained a compensable injury to his right shoulder on January 24, 2012, and prior to his death on April 14, 2014, Respondents provided Decedent with benefits pursuant to the Act. The issue at this time is whether Decedent's subsequent death was causally related to his work injury.

That being said, Petitioner's assertion that "[t]here was no report or claim Decedent used alcohol at work before or after the injury," is contrary to the evidence in the record. (*See* Petition, p. 6). At the initial compensability hearing, Decedent's co-worker, Anthony Azusenis, Jr. ("Azusenis"), testified Decedent lived with him for a period of time, and he described Decedent as a "daily" drinker. (R. p. 234; lines 13-18 & R. p. 239; lines 6-12). Azusenis further testified that he had witnessed Decedent on occasion drinking in the morning prior to work and also putting alcohol into a container that he took to work. (R. p. 239, line 16 – R. p. 240, line 4).[5]

B. Substantial evidence supports the Commission's finding that Petitioner failed to prove that Decedent's work-related right shoulder injury aggravated his alcoholism and that Petitioner failed to meet the burden of proving a compensable death claim.

The South Carolina Administrative Procedures Act ("APA") establishes the "substantial evidence" standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); S.C. Code Ann. § 1-23-380 (Supp.

[5] At the compensability hearing in 2012, Decedent denied drinking alcohol at work or before work, but he admitted that he drank every evening while working for Spirit Construction and testified that "my hobby was drinking." (R. p. 194, lines 16-18 & R p. 24, lines 2-6).

2007). In workers' compensation cases, the Commission is the ultimate finder of fact. Hunter v. Patrick Const. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986); Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Etheredge v. Monsanto Company, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Medlin v. Upstate Plaster Serv., 329 S.C. 92, 495 S.E.2d 447 (1998). Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency. Lark at 135-36, 276 S.E.2d at 306-07. In applying a substantial evidence test, an appellate court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact, unless its findings or conclusions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Friends of the Earth v. Public Service Comm'n of S.C., 387 S.C. 360, 692 S.E.2d 910 (2010).

Petitioner's foremost argument is that Decedent developed depression because of his work injury and that his depression aggravated his pre-existing alcoholism, which ultimately led to his death on April 14, 2014. That is not the appropriate question for an appellate court and is not a basis for this Court to grant a writ of certiorari. The question before the Court of Appeals was whether there was substantial evidence in the record to support the Commission's decision. The Court of Appeals found substantial evidence *did* exist to support the Commission's decision. It is clear from Petitioner's current Petition that she is asking this Court to reweigh factual evidence which has already been considered by the Commission. In her Petition, Petitioner does little more

than spin her own version of the facts in the hopes that this Court will be persuaded to improperly act as a fact-finding body.

Substantial evidence supports the Commission's decision that Petitioner failed to prove that Decedent's work-related right shoulder injury caused him to suffer from depression, aggravated his alcoholism, or caused his death. There was no diagnosis of depression from a treating physician as a result of his work accident. In fact, Petitioner 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). However, since none of the physicians who treated Decedent before his death diagnosed him with depression, it would require much conjecture and speculation to do so posthumously, and the Commission cannot base an award on surmise, conjecture, or speculation. *See* Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998).

As the Commission correctly found, Decedent had a longstanding alcohol abuse problem prior to his work injury on January 24, 2012. On July 7, 2009, Employee's sister, Ms. Zimmerman, called the police and Employee 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 Employee was a longstanding alcoholic, who consumed 16-18 beers per day and a half a pint to a pint of liquor per day. (*See* R. pp. 456-461). Decedent himself also admitted at the compensability hearing in 2012 that he drank every evening while working for Spirit Construction, and he testified that "my hobby was drinking." (R. p. 194, lines 16-18 & R p. 24, lines 2-6). Additionally, when Decedent initially began treating with Dr. Bonnarens, on April 15, 2013, he reported drinking 8-10 beers per day. (*See* R. p. 489). Importantly, as the Commission correctly found, "there is not a single medical record, either with the treating workers' compensation

doctors or his personal doctors/hospitals in Kentucky, which indicate that [Decedent's] alcohol consumption increased after the work injury." (R. p. 13).

To support her position that Decedent's alcohol intake level increased after his work accident, Petitioner relies on her own testimony, as well as the testimony of Decedent's sister, Alice Zimmerman. Importantly, the Commission specifically found that Petitioner's testimony was not reliable as it related to Decedent's history of alcohol use.[6] Petitioner admitted at the hearing that she would not be around her husband for weeks at a time while he traveled for work, that she did not know to what extent he was drinking before the injury, and that she really knew very little about Decedent's health history. (*See* R. pp. 275-276 & 283). Petitioner also testified Decedent was a beer drinker prior to his injury, and then began consuming liquor in large amounts after the injury. (R. p. 263, lines 16-23). However, her testimony was inconsistent with the history provided to the hospital in April 2014. The hospital admission report from April 10, 2014, four days before his death, stated: "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) (emphasis added).

The Commission also did not give much weight to the testimony of Ms. Zimmerman, Decedent's sister. The Commission found that her testimony regarding Decedent's pre-injury alcohol use was not supported by the greater weight of the evidence in the record. (R. p. 12). In support of its finding, the Commission noted:

> While [Ms. Zimmerman] testified that Employee did not drink alcohol excessively prior to the injury, she herself called the police on Employee in 2009, at which time it was reported he was drinking excessive amounts of beer and liquor on a daily basis. Furthermore, she acknowledged that she had no knowledge of his drinking habits when he was traveling regularly for work, but that when he was home, she saw him regularly drink beer and liquor.

[6] The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000).

Id. (internal citations omitted).

Furthermore, Petitioner relies on the opinion of David Price, Ph.D., who performed a post-humous medical records review at the request of Claimant's attorney.[7] However, the Commission considered the opinions of Dr. Price and specifically found:

> 8. We give little weight to the report of Dr. Price. Dr. Price's opinion that Employee had "No history of pain, anxiety, depression or alcoholism prior to" the work injury is clearly refuted by the pre-injury medical records. We find that Employee did have a pre-injury history of alcoholism and depression as indicated by his suicidal threats and excessive alcohol consumption pre-injury. Even Employee's other expert, Dr. Martin, acknowledges a history of depression, suicidal ideation, and alcohol dependence.
>
> 9. Dr. Price's opinion is based on incorrect, or at a minimum flawed, facts which formed his causation opinion, including but not limited to the following:
>
> a. Ms. Provins told Dr. Price that Employee "developed an alcohol abuse problem secondary to his injury," but the medical records and Ms. Provins' own testimony do not support this assertion. Ms. Provins acknowledged at the hearing that she was unaware of his heavy abuse of alcohol, to include hard liquor, as far back as 2001.
>
> b. The information provided by Employee's sister, Alice Marie Zimmerman, that prior to his injury he was "a social drinker but had not consumed alcohol the way he did following his injury" is not supported by the pre-injury medical records. Specifically, Ms. Zimmerman herself called the police on Employee and had him hospitalized in July of 2009, at which time a history was provided that he drank 16-18 beers per day, as well as half a pint to a pint of liquor per day.
>
> c. Dr. Price did not review any medical records from before the work injury, so as to ascertain a complete history of his alcohol habits

(R. pp. 10-11) (internal citations omitted).

[7] It is important to note that none of the medical providers who treated Decedent prior to his death, or in the hospital at the time of death, diagnosed Decedent with depression or provided a medical causation regarding the precise causative factors in Employee's death.

Out of all the expert opinions, the Commission gave the greatest weight to Dr. Ballenger's opinion.[8] Dr. Ballenger concluded the work injury had essentially no impact upon Employee's alcohol abuse and ultimate death. As the Commission found, Dr. Ballenger's conclusions that Decedent suffered from a progressively worsening alcoholism over the course of his adult life was consistent with the medical records, both prior to and subsequent to the work injury. (R.. p. 11).

Substantial evidence supports the Commission's finding that Petitioner failed to prove that Decedent's death in April 2014 was causally related to the work accident is supported by substantial evidence. Decedent's death was multifactorial. Per his death certificate, the immediate cause of death was acute respiratory failure and septic shock. (R. p. 685). The death certificate also indicates that other significant conditions contributing to his death were pneumonia, acute renal failure, and alcohol abuse. Id. While alcohol was a contributing factor in his ultimate death, no expert has pinned down the precise cause of death. (*See* R. p. 12). Additionally, the Commission found that even assuming Decedent increased his alcohol intake after – and because of – his work injury and assuming his increased alcohol intake was the proximate cause of his death, such would not constitute a compensable work "injury by accident" or death under the Act because it was no unforeseen or unexpected under Capers v. Flaut, 305 S.C. 254, 407 S.E.2d 248 (1991). (*See* R. p. 13). The prior medical records indicate Decedent appreciated the damage that alcohol abuse was causing, including the risk of death,[9] and Decedent had been counseled to quit drinking alcohol and failed to do so.

The Court of Appeals did not commit any errors in its appellate review of this matter. The Court of Appeals properly reviewed the Commission's decision in this matter and held that the

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[8] Dr. Ballenger has practiced clinical psychiatry and served as a forensic examiner for over 30 years.

[9] Prior to his work accident, Claimant was treated for alcohol abuse at University of Louisville Hospital, and his chief complaint was "I'm drinking myself to death." (*See* R. p. 461).

Record contained substantial evidence to support the denial of Petitioner's claim for death benefits. As such, the Court of Appeals correctly affirmed the decision of the Commission to deny Petitioner's claim for death benefits.

C. This Commission's decision does not conflict with this Court's previous rulings in Ellison II and Bartley.

Petitioner appears to argue that the Court of Appeals erred by requiring Petitioner to prove that that Decedent sustained an "aggravation" of a pre-existing condition and by failing to consider this Court's decisions in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006) and Bartley v. Allendale County School Dist., 392 S.C. 300, 709 S.E. 2d 619 (2011), which held that pursuant to S.C. Code 42-9-400 (1985 & Supp. 2005), "there is no requirement that the pre-existing condition aggravated the work injury, or that the work injury aggravated the pre-exiting condition, so long as there is a greater disability simply from the '*combined effects*' of the injury and the pre-existing condition." Petitioner requests this Court to grant her Petition to resolve whether the "combined effects" standard may be used in death benefits claims.

However, Petitioner's argument is fatally flawed, as neither Ellison nor Bartley are applicable to the current law. At the time of the claimant's accidents in both Ellison and Bartley, Section 42-9-400 provided in pertinent part:

> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, *for disability that is substantially greater, by reason of the* ***combined effects*** *of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment*, than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall in the first instance pay all awards of compensation and medical benefits provided by this Title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund. . .

S.C. Code Ann. §42-9-400 (1985 & Supp. 2005) (emphasis added). In Ellison and Bartley, this Court relied on the "combined effects" language in Section 42-9-400 to conclude that a claimant was not required to prove an aggravation of a pre-existing condition, so longs as there was greater disability simply from the "combined effects" of the injury and the pre-existing condition. In fact, as this Court specifically noted in Ellison:

> The Court of Appeals reasoned that § 42-9-400 was not applicable because it merely entitles an employer's insurance carrier to be reimbursed by the Second Injury Fund. We disagree. Providing for an employer's reimbursement from the Fund for the "combined effects" of a workplace injury and pre-existing conditions would be futile unless a claimant could actually make such a recovery in the first place. **We presume the legislature intends to accomplish something by its enactments and that it would not do a futile thing.**

Ellison, 371 S.C. at 161, 638 S.E.2d at 665 (2006) (emphasis added).

However, in 2007, following the Ellison decision, the legislature amended Section 42-9-400(a) and removed the "combined effects" language that was the basis for the decisions in Ellison and Bartley. The amended version of Section 42-9-400(a), which is applicable to the present case, provides in relevant part:

> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability from injury by accident arising out of and in the course of his employment, resulting in compensation and medical payments liability or either, *for disability that is substantially greater and is caused by aggravation of the preexisting impairment* than that which would have resulted from the subsequent injury alone, the employer or his insurance carrier shall pay all awards of compensation and medical benefits provided by this title; but such employer or his insurance carrier shall be reimbursed from the Second Injury Fund...

S.C. Code Ann. §42-9-400 (Supp. 2012).

The amendment adopting the change and removing the "combined effects" language from Section 42-9-400 applies to injuries on or after July 1, 2007, which included Decedent's injury since it occurred on January 24, 2012. Accordingly, Petitioner's argument that the Court of

Appeals' decision is inconsistent with Ellison, and her request for this Court to consider whether the "combined effects" standard may be used in death claims, are both misplaced as Ellison's holding is based on the "combined effects" language in the prior version of Section 42-9-400 that is not applicable to current case.

Additionally, while arguing the "combined effects" issue in her Petition, Petitioner notes Decedent would have had permanent disability regardless of whether he had the second right shoulder surgery recommended by Dr. Bonnarens and that the second surgery would not have lessened his degree of permanent disability. It appears Petitioner is alleging the Commission erred by failing to assign Decedent a permanent partial disability award to his right shoulder. However, Petitioner did not plead a permanent partial disability to the shoulder. While Petitioner initially asserted a Section 42-9-280 claim, that Form 50 was withdrawn in order to pursue a Form 52 death claim. Petitioner was only before the Commission on a Form 52 seeking death benefits. The issue of a permanent partial disability to the right shoulder was not before the Commission. In fact, at the underlying hearing before Commissioner Campbell, counsel for Petitioner was asked to put his position on the record, and he stated: "...[Decedent] never got to a plateau and as a result it's -- it's our position that he died as a result of the injury, not necessarily directly, but certainly it was instrumental in the death." (R. p. 251, line 21-R. p. 252, line 23). Petitioner's counsel did not allege Decedent should have been awarded a permanent partial disability award to the shoulder. Id. Accordingly, the Commission did not err by failing to award a permanent partial disability to the shoulder. (*See* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

D. Petitioner's argument regarding apportionment of benefits is not applicable in South Carolina.

Finally, Petitioner appears to argue that she should be entitled to some sort of apportionment of death benefits because of Decedent's work injury and Respondent's denial of medical benefits caused Decedent to return to or continue using alcohol. Notably, Petitioner cites three decisions from the California Appellate Courts to support her "apportionment" argument. Petitioner does not cite any South Carolina statute or case law regarding apportionment of death benefits, presumably because there is none.

Additionally, Petitioner's assertion that Respondents acted in "bad faith" is simply unfounded. Dr. Bonnarens, the authorized treating physician, recommended a second surgery (for a recurrent rotator cuff tear). The parties' respective counsel held a telephone conference with Dr. Bonnarens, and following the telephone conference, Respondents sought medical releases to further investigate causation of Decedent's recurrent rotator cuff tear.[10] Decedent, through counsel, pushed back on executing said releases, as evidenced by emails between counsel in the Record. (*See* R. pp. 871-875). As a result, Respondents' ultimately had to file a Motion to Compel, seeking execution of the medical releases to obtain out of state medical records. (R. pp. 63-69). While a motion hearing was pending and scheduled, Decedent unfortunately passed away. (*See* R. p. 23). The Commission specifically found there was no bad faith denial of medical treatment or unreasonable delay by Respondents. (*See* R. p. 9).

CONCLUSION

Petitioner has stated no grounds upon which this Court should grant a writ of certiorari. Petitioner's self-serving recitation of the evidence in this case is a distraction that should be

[10] Decedent's medical providers were located in Kentucky and would not release Decedent's medical records to Respondent's without a signed release from Decedent.

disregarded. The decision of the Court of Appeals does not deal with a novel issue of law and is not in conflict with prior Supreme Court precedent. For the foregoing reasons, this Honorable Court should decline to grant a writ of certiorari.

Respectfully submitted,

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May 26, 2021

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