

Petitioner makes the instant submission in response to Respondents' Return to Petition for Writ of Certiorari. Petitioner adopts and incorporates by reference the Statement of Case and Facts presented in his Brief.

I.

THERE WAS SUBSTANTIAL EVIDENCE DECEDENT'S WORK-RELATED INJURY AGGRAVATED HIS PRE-EXISTING CONDITION WHICH LED TO HIS DEMISE.

Respondents denied Petitioner's death benefits claims, arguing that Decedent's death was not caused by his work-related injury, but by his alcoholism. Petitioner has been consistent with her theory that the work-related injury sustained by Decedent triggered a series of events that led to Decedent's demise. the denial by Respondents of his request for medical treatment and benefits at the onset of his work-related injury. Due to his work-related injury, Decedent suffered a torn rotator cuff, which led him to miss work. When he attempted to return to Respondent Company for work, he was told there was no available work. He was forced to leave and find work out of state for a brief period of time. In the meantime, he pursued his claims for medical treatment and benefits from Respondents, who continued to deny his claims. Due to this refusal, Decedent was forced to seek relief from South Carolina Worker's Compensation Commission (hereinafter referred as "SCWCC").

Decedent was injured on January 24, 2012. Commissioner McCaskill found Decedent to have sustained compensable injury in his Order, dated September 7, 2012. But it was only after the SCWCC's Appellate Panel issued its Order, dated February 27, 2013, affirming McCaskill's decision that Respondents began providing Decedent with temporary disability benefits and medical treatment. For more than a year, Decedent's injury was unattended and untreated.

Due to the prolonged failure to attend to Decedent's injury, Decedent's condition had worsened. Despite the surgery to his torn shoulder, Decedent had not regained 100% use of his

right shoulder, and the pain brought about by the work-related injury never went away.

Following his surgery, Decedent re-injured his right shoulder. The treating orthoped found the re-injury to be related to the work injury. There was no evidence of any intervening cause. In addition, when he lost his job with Spirit Construction, he lost his insurance and had no way to seek treatment if there had been an exacerbation.

On May 15, 2013, the treating surgeon found a massive tear 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 regimen 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 initial MRI Report from over 1.5 years prior. He would never get treatment for the irreparably harmed shoulder again.

Respondents again denied his claims, demanding medical releases to obtain out-of-state medical records. As stated previously, the Claimant had no insurance with which to seek treatment. Thus, there were no records to find. Both parties requested hearings to compel the other's action. Before the issues could be put before the Court, Decedent passed away on April 14, 2014.

Petitioner reiterates Respondents' denial of Decedent's claims, both at the time of the injury and at the subsequent and/or recurrence of the injury to his rotator cuff, caused Claimant to intensify his alcohol intake. It was to this extent Petitioner asserts the causal relation between the cause of death and Decedent's work-related injury.

To establish Petitioner's claims, she has offered testimonial evidence from people who had interacted and had close relations with Decedent, such as Alice Zimmerman, as well as documentary evidence from Dr. Price, and Dr. Martin. The Appellate Panel deemed this evidence insufficient to establish compensable death.

The evidence relied upon by the Commission was not substantial nor reliable enough to meet the burden of proving compensable death.

Petitioner maintains she has sufficiently alleged and presented proof that the work-related torn rotator cuff and the prolonged denial of medical treatment and benefits contributed to the worsening of his alcohol consumption.

Petitioner submitted Dr. Price's Report. Dr. Price opined Deceased exhibited depression as evidenced by an abrupt change in his weight at the time of his surgery. And contrary to the Commission's ruling, Dr. Price's opinion made mention of Appellant's pre-injury encounter with alcohol. Dr. Price talked about how the failure to address the injury in a timely manner led to great depression. Petitioner also presented Dr. Martin's Affidavit. Dr. Martin discussed about Decedent's, psychiatric history of syncope., depressive illness and suicidal ideation. His review of Decedent's records shows the latter's coping mechanism for any depressive or medical issue was to drink alcohol.

Petitioner maintains the Commission arbitrarily disregarded Petitioner's submissions, finding them unreliable. Petitioner believes the Commission showed bias in favor of Respondents' witness, Dr. Ballenger, who has not seen the Decedent and relied on the very same materials reviewed by Dr. Price and Dr. Martin.

Substantial evidence," for purposes of judicial review of decision of the Appellate Panel of the Workers' Compensation Commission, is not a mere scintilla of evidence, nor the evidence

viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Appellate Panel reached in order to justify its action.

Petitioner reiterates her contention there can be no substantial evidence when the decision did not consider the entirety of the records in this case, but relied solely on Dr. Ballenger's opinion. It is worth noting that the failure to produce more medical records to establish how the torn rotator cuff aggravated and /or facilitated Decedent's pre-existing alcoholism was due to financial constraints brought about by the bad faith denial of benefits by herein Respondents.

The rulings in Ellison II and Bartley were not overruled with the amendment of Section 42-9-400.

In their Return to Petition for Writ of Certiorari, Respondents contend the "combined effects" standard may not be applied to the instant Petition due to the amendment of Section 42-9-400. Petitioner avers no case has overturned the doctrine provided in Ellison II and Bartley. Assuming arguendo that the new provision of Section 42-9-400 did away with the "combined effects" language and required proof of aggravation injury, the Commission's decision is still in conflict with the amended provision since Petitioner has shown that fifteen months of continued tearing and atrophying, plus the failed surgery, had left a mess of a shoulder. It should be noted that but for the work-related injury, there would been no continuous decline in Decedent's physical and emotional health for over two (2) years.

Petitioner's argument regarding apportionment of benefits is a novel question addressed to this Honorable Court's discretionary power.

Petitioner admits there is lack of jurisprudence that addresses apportionment of benefits in South Carolina, and as such, he raises this as a novel issue for the Court's determination. It is

for the reason there was no jurisprudence on this matter in South Carolina that Petitioner seeks this Honorable Court to determine if the concept may be applied in this jurisdiction.

CONCLUSION

For these reasons, as well as those addressed in his Brief to this Court, Petitioner respectfully requests the Lower Court's judgment or orders be reversed, and this case be remanded for trial.

Respectfully submitted by:

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