

**LETTER TO SOUTH CAROLINA SUPREME COURT CLERK OF COURT
PETITIONER'S CITATION OF SUPPLEMENTAL AUTHORITY**

November 2, 2021

The Honorable Patricia A. Howard
Clerk of Court South Carolina Supreme Court
PO Box 11330
Columbia SC 29211

RECEIVED

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S.C. SUPREME COURT

**RE: James Provins and Debra Provins v. Spirit Construction Services Inc. and
Insurance Company of the State of PA
Appellate Case No. 2021-000429**

Dear Ms. Howard:

Pursuant to South Carolina Rules of Appellate Procedure, Rule 208(7), Petitioner Debra Provins provides the following supplemental citation:

The key issue in the above-captioned case is the specific role of the Deceased Employee's work-related injury in contributing to his death. Deceased Employee suffered a torn rotator cuff in the course of, and in the performance of his employment. He died of acute respiratory failure but was shown to have symptoms of alcohol abuse. Petitioner alleges that due to the work-related injury and Respondents' refusal to provide immediate medical assistance, Deceased Employee suffered from depression related to his inability to provide for his disabled wife and two minor daughters. The depression grew due to the length of time it took for Respondents to accept the claim despite the company doctor's diagnosis within two (2) weeks of the accident. It is understood that rotator cuff surgery should be addressed within six (6) weeks of the injury to reduce the opportunity for further tearing and to keep atrophying of the muscles and tissues in the area to a minimum. Due to the dilatory actions of Respondents, Deceased Employee did not have surgery for fifteen (15) months following the acute injury to the shoulder. (Petition for Certiorari, pp. 1 & 2). The thoroughness of the tears and the exponential increase in

atrophy, made surgical repair nearly impossible. The MRI taken following the surgery discussed full tears, While the MRI taken three weeks after the injury spoke of tears.

Deceased Employee complained of the same pain on every visit through the course of two sets of physical therapy. He was only afforded an MRI three months after the surgery. The MRI illustrated Deceased Employee was worse than when he was injured twenty-one (21) months prior. Respondents claimed they could not move forward with his second surgery because of a failure to provide an executed HIPAA form. (Petition for Certiorari, p. 3). Deceased Employee no longer had insurance to seek treatment. Thus, the only medical treatment he received was when he would treat for his work-related injury. Respondents had no information relating to any intervening causes. They simply were delaying the process as they had done for the previous two years. Deceased died twenty-six (26) months after he was injured-a broken man. Depression resulting from the hopelessness of never being able to provide for his family, resulted in his death.

Testimony from his sister (a registered nurse) and his wife indicated he became distant and withdrawn from the family. (Appendix, pp. 259-261, 266-267, 269-270, & 299-302). This demeanor is best illustrated by the fact he had an acquaintance take him to the hospital (without noticing his wife and children) where he died alone. Furthermore, when his wife cleaned the bedroom he had resigned himself to for the time leading up to his death, she found bottle of urine because he didn't wish to encounter anyone in his travels to and from the bathroom.

Respondents contend Deceased Employee's death was due to his excessive alcohol consumption, an intentional act, which would bar Petitioner's claim for death benefits under South Carolina laws. In affirming the Panel's findings in favor of the Respondents, the Court of Appeals imposed the need to prove aggravation of pre-existing conditions to prove

compensability of a work-related injury. In addition, Respondents were rewarded for their willful and wanton denial of medical care despite their doctor surmising the rotator cuff injury; their refusal to provide the MRI prescribed by said doctor; and their refusal to provide the medical treatment when the employee's MRI verified the doctor's diagnosis.

In the following cases, courts of various jurisdictions acknowledged that a person committing suicide, the ultimate act of self-harm, can be causally related to the work injury. These cases support Petitioner's claim that seemingly intentional acts, such as excessive alcohol consumption, should not automatically be considered intervening causes that break the causation of death to the work-related injury.

The following cases bolster Petitioner's argument that aggravation was not a requirement to recover benefits. (Petition for Certiorari, pp. 10-11). Petitioner believes the Panel and the Appellate Court focused on Deceased Employee's use of alcohol after his work-related injury as part of the progression of his pre-existing condition (alcoholism). Whether Deceased Employee drank alcohol to self-medicate or as part of the progression of his pre-existing alcoholism makes no difference because his work-related injury substantially contributed to his continued use of alcohol.

1. **SEPTA v. Workers' Comp. Appeal Bd. (Hansell), 2021 Pa. Commw. LEXIS 471 (May 24, 2021)**

In SEPTA, the decedent, who had an existing psychological/ psychiatric issue, suffered a work-related back injury. Decedent exhibited severe depression and eventually committed suicide. The state's Worker's Compensation Board awarded death benefits to the Claimants (decedent's surviving spouse and child).

The Employer challenged the decision, contending the Workers' Compensation Judge

(WCJ) erred in concluding that decedent's suicide was unintentional and, therefore, not compensable. The Pennsylvania Commonwealth Court affirmed, holding that there was substantial evidence to support the WCJ's findings decedent's suicide resulted from severe depression related to the work injury. In ruling as such, the appeals court noted despite the law that prevents a worker from receiving benefits for a self-inflicted injury or intentional act, a suicide may not be considered intentional when the following elements of chain-of-causation are satisfied: (a) existence of a work-related injury; (b) the work injury directly caused the decedent to become dominated by a disturbance of the mind of such severity as to override normal rational judgment, and (c) the disturbance of mind resulted in decedent's suicide. SEPTA, citing *McCoy v. Workmen's Compensation Appeal Board (McCoy Catering Services, Inc.)*, 102 Pa. Commw. 436, 518 A.2d 883, 884-85 (Pa. Cmwlth. 1986).

This case is enlightening since it discussed how different jurisdictions addressed the issue of suicide as an intervening cause. The earliest of these cases is the Massachusetts' *In Re Sponatski* case, 220 Mass. 526, 108 N.E. 466 (1915) which introduced the "uncontrollable impulse" and the "knowledge of physical consequences" factors in suicide defense. Due to the ruling in *Sponatski*, Massachusetts law was amended to provide for compensation when "due to the injury, the employee was of such unsoundness of mind as to make him irresponsible for his act of suicide". *Ibid.*

The Pennsylvania Appellate Court noted that recently various jurisdictions have abandoned the "uncontrollable impulse" factor and relied on the existence of an unbroken chain-of-causation from the injury to the suicide. *Ibid.* Citing a New York case in which decedent painter, after sustaining work-related injuries developed chronic pain and depression, which led to his suicide. The New York Appellate Court found the decedent's disability and pain

contributed to his depression and suicide. *Matter of the Claim of Smith v. Cornell University*, 77 A.D.3d 1007, 908 N.Y.S.2d 472 (3rd Dept. 2010).

In SEPTA, the Pennsylvania Appellate Court took it to the next level by stating that despite the seeming willfulness characterizing the acts of decedent leading to the suicide, he did not act intentionally because his mind was “dominated by a disturbance of such severity that it overrode his normal rational judgment” and that “(I)t was this disturbance that resulted in decedent’s suicide”. Since that disturbance had its origin in the work-related injury, decedent’s suicide was not an intervening cause of death”. SEPTA, supra. Thus, the death was compensable.

2. In re Pelmac Indus., 2019-0605 (N.H. Oct. 13, 2021)

This case is another instance where the Court adopted a chain of causation in determining whether suicide is an intervening cause that breaks the chain of causation in worker’s compensation benefits claim.

In this case, decedent, an alarm installer and technician for Pelmac, sustained serious physical injuries in an accident while he was on his way home from working on another jobsite he was assigned by his Employer. His injuries included multiple lacerations to his head, a fractured neck, a concussion, a serious tear to his left rotator cuff, and multiple fractured ribs. A surgery was required for his rotator cuff, but it had to be postponed until his fractured neck healed and his neck brace could be safely removed. Dissatisfied with the progress of his healing, decedent committed suicide. Decedent’s surviving wife (hereinafter referred as Claimant) filed for death benefits claim.

During the hearing, Claimant testified decedent became "very anxious and worried" that his healing was not progressing at a satisfactory rate ("the longer it takes to do the surgery . . . ,

the less likely [it was that he would be] able to get full range of motion back." *In Re Pelmac, supra.*) Decedent documented his dissatisfaction with his doctors, his efforts to expedite and understand his recovery, his panic about his injuries not healing, and his fear of not being able to regain his pre-accident quality of life in a diary, which was introduced in the proceedings.

The evidence before the CAB included decedent's medical records, the accident report, opinions of two medical doctors, and testimony of decedent's widow, his two children, and a friend.

Prior to decedent's suicide, the Carrier paid his workers' compensation claim, but terminated the same after his suicide. Carrier argued decedent's death was "not causally related to the work injury and did not arise out of or in the course of employment." *Ibid.* The DOL hearing officer ruled in favor of the Carrier while the New Hampshire's Compensation Appeals Board (hereinafter referred as "CAB") overturned the hearing officer's decision. The CAB ruled "there was an obvious cause and effect" between the work accident and injuries and the subsequent suicide. Upon assessing the evidence submitted and testimonies presented, CAB ruled the suicide "was not a rational act based upon [the decedent's] deteriorating mental health and the gruesome manner" of his death by suicide. *Ibid.*

The Carrier appealed, arguing that the suicide "is not the "injury" contemplated under RSA 281-A:2, XI, because his death was caused by his willful intention to injure himself". *Ibid.* It contended CAB erred in not considering the suicide as an intervening cause of injury. *Ibid.*

The Appeal Court affirmed CAB's findings that the injury sustained in the motor vehicle accident was a work-related injury and that applying the chain-of-causation test, CAB did not err in its determination that a preponderance of evidence has shown "Decedent's suicide resulted

from a disturbance of mind of such severity as to override normal rational judgment, and that his disturbance of mind resulted from his June 5 work-related injury and its consequences.” *Ibid.*

What is significant in this case, and which herein Petitioner would like to emphasize, is the way the CAB addressed two differing expert opinions: the medical opinions of Dr. Jamieson and Dr. Drukteinis.

CAB noted Dr. Jamieson’s opinion was based upon his interview with the decedent's widow and his review of decedent’s medical records, the suicide note, and the accident report. Dr. Jamieson highlighted the nature of decedent’s traumatic brain injury (which was in areas of the brain involved with emotion control, reasoning, and judgment) and explained the "significant body of literature indicating a notably increased risk of suicidal ideation after traumatic brain injury." *Ibid.* Dr. Jamieson opined that the combination of decedent’s injuries-the traumatic brain injury and other physical injuries- “significantly affected his functional capacity” and was “the precipitating cause of his suicide.” *Ibid.*

On the other hand, Dr. Drukteinis's opinion was based upon his review of the decedent's medical records, his diary and suicide note, the accident report, and Dr. Jamieson's prior report. Dr. Drukteinis found the records "do not fully explain why" the decedent committed suicide. He opined that "[t]he motivation to commit suicide may have stemmed from injuries sustained in the motor-vehicle accident [on June 5], but [the decedent] was not compelled because of those injuries to do so and nothing in the records establishes that it was not his willful choice." *Ibid.*

In weighing the two experts' opinions, the CAB gave greater weight on Dr. Jamieson’s opinion because he "had the benefit of interviewing" the decedent's widow, whereas Drukteinis had not. *Ibid.* The CAB noted the widow was able to provide further details on how her husband's "spirits had deteriorated," which "undoubtedly gave [Jamieson] additional insight."

The CAB also found Jamieson's opinion "made more sense" in light of the "obvious cause and effect" between the June 5 injury which resulted in the decedent's "increasing despair" and his suicide.

Applying this rationale in this case, Appellant reiterates his position the Panel erred in giving greater weight to Dr. Ballenger's expert report, when he has not treated nor interacted with Deceased Employee. Neither did he consider the testimonies of the people who have been in close contact with Deceased Employee before and after his work-related injury.

Petitioner maintains the Panel erroneously disregarded Dr. Martin's Affidavit as unreliable for having relied on the testimonies of herein Petitioner and Ms. Zimmerman. (Appendix, p. 10), which the Panel described as "mere subjective history" (Appendix, p. 11). As Petitioner rationalized, there can be no better historians than Decedent's wife and sister who had been around him for at least the quarter-century prior to his death. (Petition for Writ of Certiorari, p. 9). This is significant considering due to financial constraints, Decedent Employee was unable to go to the hospital to seek treatment for his physical and mental condition (depression, anxiety, etc.).

In arbitrarily disregarding the testimonies of Petitioner and Decedent Employee's sister, the Panel deprived the Petitioner of means of showing the effect of the work-related injury upon Deceased Employee. Even without an expert's testimony, any layperson may deduce depression is reasonable and necessary consequence of a combination of the following: (1) chronic physical pain; (2) pain that was ineffectively treated for two years (due to denial of benefits); (3) impaired activity of daily living (i.e. inability to perform simple tasks such as: use his right arm, help around the house, work and provide for his family; take care of proper hygiene ("I can't wipe my ass.)); (4) stress (from the threat of foreclosure of their property

and the increasing debts incurred due to long period of unemployment; and (5) the fact his surgery, which took place 15 months after the injury (as opposed to six (6) weeks-the recommended time gap) was causing the same pain throughout two stints of physical therapy, requiring an MRI in October (18 months after the injury) which illustrated complete tears and atrophy in comparison to the February 2013 MRI, was ultimately a complete failure. Any person, subjected to these conditions, would feel a sense of hopelessness and doom. MRI, was ultimately a complete failure. Any person, subjected to these conditions, would feel a sense of hopelessness and doom.

Petitioner notes the Panel credited Dr. Ballenger's conclusion "that the Employee suffered from a progressively worsening alcoholism over the course of his adult life is consistent with medical records prior to and subsequent to the work injury," (Appendix, p. 10), while acknowledging "there is not a single medical record, either with the treating workers' compensation doctors or his personal doctors/hospitals in Kentucky, which indicate that Employee's alcohol consumption increased after the work injury..." (Appendix, p. 11).

3. **Orzech v. Giacco Oil Co., 2021 Conn. App. LEXIS 361 (AC 43941 (Conn. App. Ct. Oct. 19, 2021))**

In *Orzech*, the decedent, who had a pre-existing knee injury, slipped and fell to the ground while performing his duties to Employer. Following this incident, decedent was unable to go to work as he aggravated his existing knee injury to such an extent that he could no longer work or carry out his daily activities. Dr. Kolstad recommended knee replacement surgery, however, the employee's health insurance had been canceled 30 days after the incident and he could not afford the procedure. Decedent filed a workers' compensation claim relating to the compensability of the knee replacement surgery. In the hearing for his disability claim, decedent

testified to the following: (1) the pain was unbearable, (2) he was unable to walk long distances (3) unable to drive, (4) his mobility is limited to the point that he has to go up and down stairs in his home while on his butt, pushing himself up with his hands, and (5) he was no longer able to do household chores, like mowing his lawn.

Before the matter was resolved, decedent died of acute intoxication due to the combined effects of alcohol, Eszopiclone, Lorazepam, Sertraline and Diphenhydramine. The manner of death is listed as suicide. *Ibid.*

Decedent's wife filed for survivorship benefits. The evidence consisted of decedent's medical records, autopsy report, the police report, death certificate, and testimonies of Surviving Spouse (hereinafter referred as Claimant), decedent's stepdaughter and brother-in-law, as well as Dr. Waynik and Dr. Selig.

Claimant testified that prior to his work-related fall, decedent was a happy-go-lucky guy who was used to being active- played with his kids, mowed his lawn, took care of his koi ponds and went to work despite pain in his knee. After the fall, decedent started complaining of back, knee and shoulder pain after his fall, crying and complaining "this is not life. decedent's stepdaughter and brother-in-law both observed him lost interest in many activities and did not want to do anything anymore. *Ibid.*

After a records review, Dr. Waynik concluded that the work injury was a substantial contributing factor in decedent's major depression and anxiety and ultimately, his death. Records indicate there was also a dramatic change in his personality. He opined " decedent went from being an active person to being housebound" which "made him increasingly depressed". *Ibid.* Waynik expressed " it's very common in people who have any kind of chronic illness to get depressed after a while." *Ibid.*

Dr. Segil presented a contradicting testimony. Dr. Segil did not consider Decedent to be severely depressed for several reasons: (1) the decedent remained active following the work incident, (2) the materials he reviewed did not suggest that the decedent suffered from severe depression, and (3) the circumstances of the decedent's death could lead to the conclusion that he unintentionally overdosed in an attempt to medicate himself. *Ibid.* Dr. Selig discussed Difficulty in determining whether Decedent intentionally committed suicide or died from an accidental overdose.

The commissioner, crediting Dr. Waynik's opinion, found Decedent died by suicide as a result of depression that stemmed from compensable work injuries and that the plaintiff was entitled to survivorship benefits.

The Employer petitioned for review of the commissioner's findings, alleging the same was in conflict with the ruling in *Sapko v. State* (305 Conn. 360), where the Court determined that consumption of an excessive amount of alcohol and medication prior to the state's correctional officer's death constituted a superseding cause that broke the chain of causation between the work incident and employee's death. The Compensation Review Board (hereinafter referred as "Board") affirmed the commissioner's finding and award. The Employer appealed.

On appeal, the Appellate Court of Connecticut distinguished Orzech's case from Sapko, where the officer's death was declared an accident, and not a suicide. In Sapko, the deceased officer overdosed on medications, including one that had no connection to his compensable back injuries. It was therefore deemed a superseding cause that broke the causal link between his compensable injuries and his *accidental* death.

In *Orzech*, decedent's death was declared as suicide per the Accident Report. The Appellate Court found the commissioner's findings that decedent developed depression

following the work incident, that his compensable injuries were a substantial contributing factor to his development of depression, that the manner of his death was a suicide, and that his suicide stemmed from his depression, were reasonable and grounded in the evidence produced during the proceedings before the commissioner. The Connecticut Appellate Court concluded:

Whether “an injured employee [dies by] suicide by alcohol alone or a combination of alcohol with other toxins should make no difference; suicide caused by depression arising from a compensable injury is compensable,” regardless of how the suicide occurred. R. Carter et al., 19 Connecticut Practice Series: Workers’ Compensation Law (Supp. 2020–2021) § 5:5, p. 164. That the decedent died by suicide by consuming alcohol and certain medications that bore no relation to his compensable injuries does not affect our analysis.

The instant Petition had many similarities with the *Orzech’s* case. That Deceased Employee died partly of alcohol abuse should not be considered as intervening cause because it has already been existing at the time of the injury, and it was shown the injury caused depression upon herein Deceased Employee.

4. **Matter of Meager v. Saratoga County Sewer Dist., 2020 N.Y. App. Div. LEXIS 4310**

In this case, the Decedent sustained a work-related injury to his head in May 2015 and his claim for workers' compensation benefits was thereafter established. Decedent was admitted to a psychiatric hospital on May 25, 2017, after his family feared he had attempted suicide. He was discharged on June 1, 2017, and he died by suicide five days later. His surviving spouse filed for workers' compensation death benefits.

The claim was granted by a Workers' Compensation Law Judge (hereinafter WCLJ) the ruling was affirmed by the state’s Workers' Compensation Board. Despite appeal by the Employer, the New York Supreme Court, Third Judicial Department upheld a line of cases that

awarded worker's compensation death benefits for a suicide which resulted from "insanity, brain derangement or a pattern of mental deterioration caused by work-related injury". *Ibid.* citing Matter of Musa v Nassau County Police Dept., 276 AD2d 851, 852 [2000]; see Matter of Delacruz v. Incorporated Vil. Of Freeport, 175 AD3d at 1740; Matter of Smith v Cornell Univ., 77 AD3d 1007, 1007-1008 [2010], lv denied 16 NY3d 701 [2011]).

The importance of this ruling is the Court's acknowledgment that:

"causal relationship between an industrial accident and a resulting mental condition need not be direct and immediate. It is sufficient that the industrial accident is a contributing cause, even if it precipitated [the] decedent's preexisting mental condition"

Ibid., citing Matter of Altes v Petrocelli Elec. Co., 270 AD2d 767, 769 [2000] [internal quotation marks and citations omitted]; see Matter of Smith v Cornell Univ., 77 AD3d at 1008).

Petitioner believes Respondents have succeeded in arguing Deceased Employee's excessive alcohol intake caused his death. It is their contention the independent act of intentionally drinking alcohol to his ultimate death terminates any benefits Petitioner may have been entitled. However, this argument succeeds in proving she is entitled to death benefits pursuant to SECTION 42-9-290.

Petitioner believes the cases provided from other jurisdictions conform to this Court's findings in *Wickersham v. Ford Motor Co.*, 853 S.E.2d 329 (S.C. 2020). Suicide, or intentional harm, are not absolute bars to recovery. But for Respondents' failure to provide Decedent with timely medical care as the Act requires, he would have gotten the surgery which would have enabled him to simply have hope he would once again be able to provide for his family. Ironically, it was Respondents' intentional withholding of Temporary Total Disability benefits and medical care which eventually killed Decedent.

5. Gordon v. Schweiker, 725 F.2d 231 (4th Cir. 1984)

Finally, in the case Gordon v. Schweiker, the Fourth Circuit Court of Appeals ruled that a remand of the case to the Secretary to assess the degree of alcohol abuse. The Court in Gordon ruled, where “there is evidence of alcohol abuse, the Secretary must inquire whether the claimant is addicted to alcohol and has lost the ability to control its use. Hicks v. Califano, 600 F.2d 1048, 1051 (4th Cir. 1979). Disability benefits cannot be denied because of a claimant's continued alcohol abuse if the claimant is unable voluntarily to stop drinking. *See Adams v. Weinberger*, 548 F.2d 239, 245 (8th Cir. 1977).

This supplemental citation bolsters Petitioner’s argument that his alcoholism should not be considered an intervening cause because it has been existing prior to the work-related injury. The injury sustained by Petitioner had affected, if not, contributed significantly to his excessive drinking that led to his death.

This case is significant when it ruled “[u]nless the [ALJ] has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits,” a reviewing court is normally unable “to scrutinize the record as a whole to determine whether the conclusions reached are rational.” Gordon, 725 F.2d at 236 (quoting Arnold v. Sec'y of Health, Educ., & Welfare, 567 F.2d 258, 259 (4th Cir. 1977)); see also 20 C.F.R. §§ 404.1527(b)-(d). In Gordon, the ALJ failed to indicate the weight given to the various medical reports submitted by Gordon. Ibid. The Court in Gordon remanded the case to the district court with instructions further to remand the case to the Secretary with directions to the Secretary to reconsider the case and to indicate explicitly the weight accorded to the various medical reports in the record. Ibid.

In the instant case, Petitioner believes the Panel arbitrarily rejected her and Deceased Employee’s sister’s testimonies for being “subjective”, and Dr. Martin’s evaluation report, for

relying on Dr. Price's Report and the relatives' testimonies.

Respectfully Submitted,

s/Donald L. Smith

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