

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2019-001141

Barry Adickes, Claimant,

Respondent,

v.

Philips Healthcare, Employer, and Fidelity &
Guarantee Insurance Company, Carrier,

Appellants.

**APPELLANTS' PETITION FOR REHEARING
AND/OR REHEARING EN BANC
AND REQUEST FOR ORAL ARGUMENT**

Pursuant to Rules 221(a) and 240, SCACR, Appellants submit this Petition for Rehearing to correct an apparent misunderstanding of the facts and misapplication of the law, and to prevent a gross miscarriage of justice resulting from this Court's Opinion dated July 27, 2022.

Appellants contend that this Court overlooked or disregarded material facts and/or misapplied controlling principles of law when arriving at the July 27, 2022 Opinion. Most importantly, this decision fails to abide by the holding and explicit remand directives from the first appeal in this case, which are laid out in this Court's Op. No. 2018-UP-027 (hereinafter referred to as "*Adickes I*"). *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018)

Adickes I is an unpublished opinion, yet it is undoubtedly the law of the case. *Id.*, Rule 268(d)(2), SCACR. *Adickes I* held that the pertinent statute, S.C. Code Ann. § 42-9-20, explicitly

mandates that “in no case” will PPD benefits be available to a claimant beyond the term of 340 weeks “from the date of injury.” *Id.* In complete contravention to the holding in *Adickes I*, this Court has determined that a permanent wage loss award can extend beyond the 340-week limitation period. *Adickes v. Philips Healthcare*, Op. No. 2022-UP-316 (S.C. Ct. App. Filed July 27, 2022).

Appellants prevailed on the statutory language issue in *Adickes I*. *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018). While on remand, Appellants have spent over four years defending this Court’s decision in *Adickes I*, while awaiting a final, and consistent decision from this Court. All while being subjected to improper and egregious penalties and fines assessed by the Commission during the proceedings.

Respectfully, this Court’s recent opinion is contrary to the applicable statute and flies in the face of controlling case law. Most distressing is the fact that it overrules the law of the case established in *Adickes I*, without providing any justification warranting same. Nothing has changed since this Court issued *Adickes I*, aside from Adickes’ appellate attorney subsequently becoming a South Carolina Court of Appeals Judge. There have been no modifications or amendments to the statute, nor have any cases subsequent case reanalyzed the application of same which could warrant *Adickes I* being overturned.

As it stands, this decision not only allows Adickes to make inconsistent arguments and take contrary positions from the first appeal of this case, but it allows him to benefit from same. In allowing Adickes to avoid the law of the case by arguing an adverse position *in the same case* is erroneous and manifestly unjust. If this Opinion were to stand, then every losing party could continuously appeal, defeating the doctrine’s purpose to promote finality and an end to litigation. Judicial estoppel precludes parties from misrepresenting the facts in order to gain an unfair

advantage, so once “a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477.

As such, Appellants request a Rehearing En Banc because (1) consideration by the full court is necessary to secure uniformity of the Court’s decisions and/or (2) the case involves a question of exceptional importance in the workers’ compensation system, as Employers and Insurers have been prejudiced for decades by the misinterpretation/misapplication of S.C. Code Ann. § 42-9-20. Rule 219, SCACR(a). At the very least, Appellants request an opportunity to participate in Oral Arguments before this Court.

For the reasons set forth below, this Court should grant Appellants’ Petition, withdraw the original opinion and grant a new opinion overturning the Appellate Panel’s Orders:

CALCULATION OF ADICKES’ PERMANENT WAGE LOSS AWARD:

In the first appeal, Appellants appealed the Commission’s lump sum award of 340-weeks of wage loss benefits, arguing that it exceeded the limitation laid out in the statute. *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018). This Court agreed and issued *Adickes I*, which held that the Appellate Panel erred by extending the timeframe and award for PPD benefits in contravention of the plain language of S.C. Code Ann. § 42-9-20 and the legislative intent for compensation. *Id.* On remand, the Commission was directed to calculate Adickes’ wage loss award consistent with *Adickes I* opinion; yet, this Court’s Opinion reverses rather than enforces this Court’s prior Opinion in this case. *Id.*

A. THIS COURT COMMITTED LEGAL ERROR BY RELYING ONLY ON THE COURT’S DECISION IN ADICKES I, RATHER THAN GAINING AN UNDERSTANDING OF THE FACTS AND APPLYING THE LAW TO THE ISSUES ON REMAND.

This Opinion awards Adickes PPD benefits commencing as of the date of his termination from Philips (January 17, 2014). *Adickes v. Philips Healthcare*, Op. No. 2022-UP-316 (S.C. Ct. App. Filed July 27, 2022). It justifies this decision by holding merely that “nothing in *Adickes I* suggests a different start date for the calculation.” *Id.* at ¶ 1. Similarly, this Opinion wholly disregards the longstanding controlling legal authorities holding that permanent awards are entered as of the date of MMI. *Id.* Rather, this Court merely deferred to the Single Commissioner’s decision in this regard, with the justification that *Adickes I* “failed to address how MMI impacts the calculation of a wage loss award.” *Id.*

First and foremost, this Court erred by arrived at the above decisions simply by referring back to the findings and conclusions contained in the *Adickes I* opinion. That’s it, nothing else. There is no discussion of which controlling legal authorities support these holdings, because no legal analysis was performed. The only citation in this entire paragraph is reference to *Adickes I*. *Id.* The Record on Appeal in this consolidated claim contains years’ worth of decisions from Single Commissioners and Appellate Panels, as well as thorough briefing by the parties. Rather than analyzing whether the Commission’s decision following remand is proper, this Court has improperly looked no further than the first decision in this case. *Adickes I* didn’t suggest a different date for Adickes’ wage loss award to commence, so this Court relies only on that determination. *Adickes I* didn’t address the date of MMI or impact of same on a wage loss award, so this Court relies only on that determination. If *Adickes I* had fully determined these issues, no remand would have been necessary. Frankly, and with due respect, Appellants spent years fighting for a proper Award in this case, aligned with *Adickes I*, and find it disappointing that this Court’s review went no further than a recitation of the *Adickes I* Opinion.

B. THIS COURT MISINTERPRETED THE FACTS OF THIS CASE, DISREGARDED ARGUMENTS MADE IN THE FIRST APPEAL AND MISAPPLIED THE LAW BY PROVIDING ADICKES WITH TEMPORARY PARTIAL DISABILITY BENEFITS, A REMEDY WHICH HE NEVER SOUGHT.

This Opinion awards Adickes permanent wage loss benefits for the period of January 17, 2014 – November 17, 2017. Adickes didn't reach MMI for all of his work-related injuries until January 2015, so this decision awards Adickes both Temporary and Permanent Partial Disability benefits, even though Adickes never sought Temporary Partial Disability benefits.

Make no mistake – it is undisputed that Adickes only sought a Permanent Partial Disability award in this claim, as evidenced by the remedy listed in every single one of the filings submitted and in the arguments Adickes made at every level in the first appeal. In fact, Judge Hewitt (Adickes' first appellate attorney) used the word permanent EIGHT times in Adickes' Final Brief to this Court. [R. pp. 152-165] In a complete, and frankly disingenuous, about-face, Adickes has refused to agree that he sought permanent benefits at any time while this case has been on remand.

The Court's recent decision relies on the above inapposite arguments made by Adickes on the second appeal in order to extend his wage loss award on the front end. Adickes should have been judicially barred from asserting contrary positions in the same case, so it was legal error for this Court to rely on same. As such, this Court should reverse Adickes' award of temporary partial disability benefits and only calculate Adickes' award of permanent partial disability benefits, as directed in the remand order.

C. THIS COURT MISAPPREHENDED THE FACTS, FAILED TO APPLY THE PROPER LEGAL ANALYSIS AND COMMITTED AN ERROR OF LAW BY NOT HOLDING THAT ADICKES' PERMANENT WAGE LOSS AWARD COMMENCES AS OF THE DATE OF MMI.

The remand directives in *Adickes I* could not have been clearer: “Accordingly, we **reverse** the Appellate Panel’s Award of 340 weeks’ compensation **commencing January 17, 2014**, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20.” *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018). (*Emphasis added*). Yet, while on remand, Adickes misled the Commission by claiming that *Adickes I* did not reverse the finding that his disability began January 17, 2014. [R. p. 224]. He went as far as to assert that “the Court of Appeals expressly affirmed the date benefits began,” and that’s the “law of the case [R. 224-225]. Adickes incorrectly instructing the Commission as to the issues on remand wasn’t a simple misinterpretation of the plain language from *Adickes I* (ironically); rather, this was a contrived scheme by Adickes to improperly lead the Commission astray in his favor.

In reality, *Adickes I* did not establish that Adickes’ wage loss award began on the date of his termination. *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018). Rather, *Adickes I* discussed the date of his termination to illustrate that the Commission’s award of 340-weeks lump sum improperly awarded Adickes weekly benefits during the years that he continued working. *Id.* at ¶ 3. On this point, *Adickes I* held that Adickes “cannot be compensated for ‘lost wages’ while he worked full-time and earned a full-time salary. *Id.* Moreover, if that was the established “law of the case” as asserted by Adickes, there would not have been a need for a remand, as the calculation of the number of weeks between the date of termination and the 340-week limitation is simple math.

Adickes took another inapposite position with regard to the issue of MMI, arguing that MMI is immaterial to a wage loss claim and only relevant to the issue of medical care. [R. 647]. Up until *Adickes I*, the timing of a Claimant being placed at MMI had no impact on the PPD award

because they were routinely awarded as a lump sum 340-weeks, so Adickes took this contradictory position in the second appeal to try and extend the award on the front end.

While the timing of MMI had no impact on PPD awards prior to *Adickes I*, it is very well established that MMI is a prerequisite for entry of a permanent award. It is undisputed that Adickes adamantly argued in the first appeal that his case was ripe for a permanency determination because he was at MMI for all of his work-related injuries. [R. pp. 133, 135-136]. Judge Hewitt argued “Dr. Barron’s permanent impairment rating to Barry’s right shoulder is evidence that a permanency award is appropriate.” [R. p. 157]. In fact, Judge Hewitt spent 2 out of the 14 pages of Adickes’ Final Brief to this Court arguing that Adickes was at MMI for all of his work-related injuries. [R. pp. 157-158]. Contrary to the language in this Opinion, the issue of MMI was certainly litigated and addressed, as the discussion took up the entire first page of the *Adickes I* opinion. *Adickes v. Philips Healthcare*, Op. No. 2022-UP-316 (S.C. Ct. App. Filed July 27, 2022).

As thoroughly discussed in Appellants’ Final Brief, the South Carolina Supreme Court has held that “workers’ compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as permanent total or partial disability, or as a percentage of impairment to a scheduled member. *Curiel v. Environmental Management Services*, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007). A litany of cases from this Court and the Supreme Court of South Carolina have cited *Curiel* for this very proposition when evaluating when to terminate a Claimant’s temporary benefits in favor of permanent benefits, which is upon a finding of MMI. See *Smith v. S.C. Dep’t. of Mental Health*, 335 S.C. 396, 399, 517 S.E.2d 694, 695–96 (1999).

Accordingly, this Court improperly relied on inapposite positions/arguments and contrary positions taken by *Adickes* and failed to apply the prior legal analysis to determine when *Adickes*' wage loss award should commence.

D. THIS COURT COMMITTED AN ERROR OF LAW BY DISREGARDING THE LAW OF THE CASE AND AWARDING A WAGE LOSS AWARD EXTENDING BEYOND THE 340-WEEK LIMITATION.

Adickes I determined that the Commission's interpretation and application of S.C. Code Ann. § 42-9-20 amounted to an error of law. *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018). Specifically, the *Adickes I* Court found that "[t]he applicable portion of section § 42-9-20 reads: 'In no case shall the period covered by such compensation be greater than three hundred forty weeks from the date of injury.' We find this to be a limiting clause that restricts the timeframe and amount of coverage and should be strictly interpreted." *Id.* at ¶ 3. *Adickes I* further noted that the issue wasn't one of statutory interpretation, as the language of S.C. Code Ann. § 42-9-20 is clear and unambiguous. *Id.* As such, this Court held that S.C. Code Ann. § 42-9-20 is an explicit mandate that "in no case" will PPD benefits be available to a claimant beyond the term of 340 weeks "from the date of injury."

This Court admonished the Commission's "interpretation" of the statute allowing for a lump sum award of 340 weeks in *Adickes I*, yet this Court has now contradicted its prior decision by holding that the last sentence of S.C. Code Ann. § 42-9-20 somehow operates to extend a wage loss award. *Adickes v. Philips Healthcare*, Op. No. 2022-UP-316 (S.C. Ct. App. Filed July 27, 2022). This Opinion holds that the sentence "In case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability" operates to provide a Claimant with double recovery of TTD benefits previously received in the claim. *Id.*

Adickes argued that this sentence operated to extend wage loss awards in the first appeal, which this Court rejected. In his pre-hearing brief to the Appellate Panel, Adickes argued that “the last sentence of this statute clearly states that ‘in case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability. This means that 340 weeks is the maximum Claimant could receive because the *last sentence of § 42-9-20 extends the period*. The 340-week period from the date of injury only applies where no temporary total disability benefits were paid.” [R. pp. 144 – 145, emphasis added]. The Appellate Panel agreed with Adickes in the first appeal and held that Adickes was entitled to a lump sum of 340 weeks because he had previously received a period of TTD benefits. [R. 25]. On appeal, this Court unequivocally rejected this argument, as evidenced by the strong language in Adickes I: S.C. Code Ann. § 42-9-20 is an explicit mandate that “in no case” will PPD benefits be available to a claimant beyond the term of 340 weeks “from the date of injury.” *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018).

Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009). Adickes’ counsel informed the Commission that the remand was for a ruling on whether the last sentence of the statute operates to extend a wage loss award, in an inappropriate attempt to relitigate the same issue. [R. 640].

Moreover, even if not barred by the law of the case doctrine, there is no sensical basis for this Court’s decision that the last line of the statute operates to extend wage loss awards. The legislature included the aforementioned sentence to distinguish the differences between calculation of a permanent total disability award vs. a permanent partial disability award. Appellants properly

applied this sentence of the statute by never arguing that the Claimant's PPD entitlement is limited to 332 weeks and 2 days from his date of accident (340 weeks from the date of accident *less the 7 weeks and 5 days of TTD benefits he received*).

Awards of permanent total disability ("PTD") benefits and permanent partial disability ("PPD wage loss") benefits are both predicated on showing a loss of earning capacity (total vs. partial), but they differ significantly when it comes to how the awards are calculated. Simply put, wage loss awards are much more restricted than PTD awards, so the legislature saw it fit to place this safeguard within S.C. Code Ann. § 42-9-20 to prevent the award from any additional reductions. This sentence is for the protection of Claimants, but it certainly doesn't allow for double recovery of all periods of temporary benefits received during in the claim.

In a PTD award under S.C. Code Ann. § 42-9-10(A), the Claimant is entitled to a payout of 500 total weeks of total disability benefits - temporary and permanent combined. Thus, when the Commission issues a PTD Award, it is always noted that the award is for 500 weeks *less the number of weeks of benefits paid to date*. In contrast, PPD wage loss awards are limited by the timeframe in which a Claimant could potentially be entitled to same, 340 weeks from the date of accident, so this sentence acts to protect the award from any additional reduction in potential benefits. Application of this sentence is best understood by way of illustration:

PTD Award Calculation: A Claimant receives 200 weeks of TTD benefits continuously from the date of accident before reaching MMI. The Claimant is awarded PTD benefits. The Claimant would be entitled to an award of 500 weeks of benefits *less the amount of TTD benefits received*, amounting to a **PTD award of 300 weeks**.

PPD Award Calculation: Same Claimant is found entitled to a PPD wage loss award. The Claimant is now entitled to **140 weeks of PPD benefits**, since partial disability benefits cannot extend beyond 340 weeks from the date of injury. If calculated like a PTD award, the Claimant's PPD award would be 340 weeks from the date of accident *less the amount of weeks of TTD benefits received*. This would amount to a PPD award limited to 140 weeks from the date of accident (which has already passed), illustrating the very purpose of this sentence.

If looking at the current decision in a vacuum, an additional 7 weeks and 5 days of benefits doesn't seem like much to fuss about. From a bigger picture perspective though, this Court's flawed interpretation of this sentence could allow for a PPD wage loss award amounting to more than the maximum number of weeks allowed under a PTD award. Here's an illustration of how this Court's current decision would apply to the Claimant above:

The Claimant would receive 200 weeks of TTD benefits and a wage loss award of 140 weeks of benefits. On top of that, the Claimant would receive a "credit" for the initial 200 weeks of TTD benefits, therefore entitling the Claimant to **540 weeks of total benefits**.

The above illustration shows that this decision will produce absurd results which certainly cannot be aligned with the intent of the legislature; as such, a new decision should be issued in accordance with the holding in *Adickes I*.

PENALTIES ASSESSED BY THE FULL COMISSION ON REMAND:

During the years that this case remained on remand, the Full Commission assessed egregious penalties and fines against Appellants, which this Court has improperly affirmed:

E. THIS COURT MISAPPREHENDED THE FACTS OF THE CASE AND MISAPPLIED THE APPLICABLE LAW IN DETERMINING THAT APPELLANTS PREMATURELY TERMINATED ADICKES WEEKLY BENEFITS.

When *Adickes I* was issued in January of 2018, this Court stated in no uncertain terms that Adickes was not entitled to weekly benefits beyond the 340-week limitation period, which was **September 24, 2017**. *Adickes v. Philips Healthcare*, Op. No. 2018-UP-027 (S.C. Ct. App. 2018). Even so, Appellants continued making weekly payments in the hopes that the Commission would issue an Order shortly after the remittitur. As months continued to pass following same, Appellants became concerned about not being able to recoup an overpayment on Adickes' permanent benefits.

Appellants suspended Adickes weekly benefits on **February 6, 2019**, which is beyond the 340-week limitation period (September 2017), beyond 7 weeks and 5 days past the PPD limitation period (November 2017) and beyond the number of weeks that are due under a proper calculation under the statute (138 weeks).

The Commission held that Appellants were under an obligation to continue paying weekly benefits to Adickes while the case remained on remand. As such, the Commission held that Appellants were subject to penalties for “prematurely terminating” Adickes’ wage loss benefits, at the amount of 10% of the unpaid disability benefits.

This Court’s Opinion affirmed the Full Commission’s decision that Appellants prematurely terminated Adickes’ payments, yet based this holding on the fact that the Commission properly determined that the final sentence indicates that the weeks of TTD benefits do not count against his PPD entitlement of 340-weeks from the date of accident. This Court improperly analyzed the Commission decision and/or misapplied the controlling law on this issue, since application of the last sentence of S.C. Code Ann. § 42-9-20 played no part in the Commission’s decision that Appellants were subject to penalties in this regard.

Rather, the Commission assessed penalties against the Appellants for not continuing to pay weekly benefits while the case remained on remand for years – which had nothing to do with the Commission finding that the 340-week limitation period could be extended. This Court’s determination that the penalties were proper due to the Commission properly finding that the last sentence of the statute extends the wage loss award by nearly 8 weeks is an error of law, as its wholly inapplicable to the holding below.

Had this Court analyzed this issue under the proper legal authorities detailed in Appellants' Final Brief, it should have held that the Appellants fully complied with the award payment obligations laid out by the South Carolina Supreme Court in *Case v. Hermitage Cotton Mills*. 236 S.C. 515, 530, 115, S.E.2d 57, 66 (1960). Appellants properly paid the weekly benefits accrued ***after the Full Commission decision*** at the time that the case was taken up on appeal in March of 2016.

If this Court agrees with Appellants and the controlling legal authorities, Adickes is entitled to a wage loss award in the amount of **140 weeks and 4 days**, representing the date of MMI (January 14, 2015) through the 340-week limitation period (September 24, 2017). If this Court agrees with Adickes' argument that his wage loss award commences on the date of his termination (January 17, 2014) and runs through 347 weeks and 5 days from the date of accident (November 19, 2017), Adickes is entitled to a wage loss award in the amount of **200 weeks and 2 days**.

Appellants have paid Adickes **150 weeks** of permanent wage loss benefits (March 22, 2016 – February 5, 2019). As such, Appellants contend that Adickes has been paid in full. Adickes contends that he is owed 50 additional weeks of PPD benefits, amounting to an award of **\$35,210.00**. The Commission, which this Court has affirmed, directed Appellants to recommence payment of weekly benefits as of February 6, 2019 through the date that the issue is “fully determined.” Under this decision, Appellants owe Adickes 181 weeks of benefits as of the date of this Court's July 27, 2022 Opinion, plus 10% penalty on same. To demonstrate the egregiousness of the Order to recommence with penalties, if this Opinion stands, Adickes is entitled to weekly wage loss benefits amounting to **\$140,349.57** ($\$704.92 \times 181 \text{ weeks} \times 10\% \text{ penalty}$). This figure is nearly 5x the wage loss figure sought under Adickes own calculations.

Under the proper legal analysis, Appellants were not under any obligation to continue payment of weekly wage loss benefits to Adickes following *Adickes I*, so this Court's decision ordering Appellants to recommence and assessing penalties against Appellants is an error of law and should be reversed.

F. THIS COURT COMMITTED AN ERROR OF LAW BY MISAPPREHENDING THE FACTS OF THE CASE AND NOT PROPERLY ANALYZING THE CONTROLLING LEGAL AUTHORITIES IN DETERMINING THAT APPELLANTS WILLFULLY DISOBEYED AN ORDER.

The Full Commission also assessed civil fines against Appellants under S.C. Code Ann. § 42-3-175, holding that Appellants 27-day delay in authorizing Adickes' medications constituted willful disobedience of an Order. The Commission ordered Appellants to pay fines in the amount of \$500/day for a period of 27 days, amounting to \$13,500.00. This Court affirmed the Commission's assessment of civil fines, holding that it was supported by the substantial evidence in the record.

This is an error of law, as there is zero evidence in the record supporting Appellants acting in a willful manner whatsoever, which cases have defined as "voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires." The Commission and this Court make no mention of any acts on behalf of Appellants supporting this allegation, because there are none in the record, so this decision should be reversed.

CONCLUSION:

For all of the reasons above, Appellants respectfully request that this Court grant Appellants' Petition, reverse the decisions in this Opinion and grant a new opinion overturning the Appellate Panel's Orders.

Respectfully submitted,



August 11, 2022

Brooke A. Payne (SC Bar# 81085)
PAYNE LAW GROUP, LLC
P.O. Box 2449
Mt. Pleasant, SC 29465
843-810-8955

Attorney for Appellant

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the Petition for Rehearing via email and by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Bill Smith
Chappell, Smith & Arden
PO Box 12330
Columbia, SC 29211

brooke.payne

August 11, 2022

Brooke Payne
PAYNE LAW GROUP, LLC