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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Opinion No. 5948 (S.C. Ct. App. Filed October 26, 2022)

Frankie Padgett, Claimant. . . . . Respondent,

v.

Cast and Crew Entertainment Services, Inc., Employer,
and American Zurich Insurance Company, Carrier, ... Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
Stephen@SamuelsReynolds.com
S.C. Bar No. 15394

Attorney for Respondent

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QUESTIONS PRESENTED

I. Whether the Court of Appeals properly held that there is no legal nor factual basis on which Cast & Crew can void the employee/employer relationship to evade their liability under the Workers' Compensation Act.

II. Whether the Court of Appeals correctly rejected Petitioners' argument that Padgett had exceeded the 500 week cap on compensation for a particular case.

III. Whether the prior settlement agreement's prohibition on applying for employment with Cast & Crew is invalid as it violates the Act, is against public policy, does not apply to an individual employed by a movie production company, and is preempted by a collective bargaining agreement..

IV. Whether Cast & Crew failed to prove fraud on the part of Padgett when there is no evidence he used a different name on his employment documents.

V. Whether § 42-9-170 allows an employee to recover further benefits when his work-related injury is aggravated by or aggravates a preexisting condition, such that he is entitled to recover as much as 500 weeks for a single claim.

STATEMENT OF THE FACTS

This is an appeal by the Employer and Carrier from the Workers' Compensation Commission following a Petition for Hearing to Terminate Compensation filed by the Petitioners. The Single Commissioner granted Petitioners' Petition in part and ordered compensation to immediately be terminated on June 15, 2018. The Appellate Panel reversed and reinstated Padgett's weekly compensation.

The Claimant, Frankie Padgett, is a member of the International Brotherhood of Teamsters. Padgett works as a truck driver for various movie production companies who produce movies and television shows in South Carolina.

Cast & Crew Entertainment Services, Inc., is a California-based company which provides payroll and employee benefit services (including workers' compensation) to the movie and television industry. Cast & Crew is not an actual employer of the people working on the movies. Rather, it is a *payroll service*. By using Cast & Crew's payroll services, the production companies making the programs avoid the hassle of creating a human resources and payroll department for a production which may last only a few months.

Cast & Crew is one of two companies providing this service, the other being Entertainment Partners.

Each show or movie is produced by a production company. The production company needs to hire and pay the crew (technicians, set designers, lighting, gaffers, truck drivers, caterers, hair and makeup, etc) and the actors. For truck drivers, they contact the local Teamsters Union. The Union gives them a list of names, from which they select the truck drivers. Each driver is called, offered the job, and told where to report. The driver reports to the set where he meets with the crew chief

and fills out new hire paperwork. He may not know whether his paycheck comes from Cast & Crew or Entertainment Partners until he receives the actual check.

In 2009, Padgett was hired through the Union by ABC Productions to work on a show called *Army Wives*. ABC Productions hired Cast & Crew Entertainment Services, Inc., to handle payroll and employee benefits for the duration of the production.[1] Padgett suffered a work-related injury to his left leg during the production of *Army Wives*. Cast & Crew provided workers compensation benefits to Padgett through its contract with ABC Productions. This case ultimately settled on September 27, 2012 on a clincher for a $150,000.00 lump sum. The case settled before Padgett reached MMI or completed treatment. The clincher included James proration language but did not otherwise allocate the settlement, except to release liability for every possible claim that could have been raised. [R.P 31-37]

After the first case settled and he recovered from his left leg injury, Padgett returned to work in movies in 2013. He worked on *Reckless - Season 1*, produced by Eye Productions, Inc. (an affiliate of CBS). In 2014, he worked on *Identity - Pilot*; also produced by Eye Productions. He then worked on *South of Hell*; produced by SOH Productions, LLC. For these productions, Padgett received his paychecks made out to Frankie Padgett from Entertainment Partners. [R.P. 50-52].

In 2015, Padgett was hired through the Union by Danger Boy Productions to work on a show

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[1]There is no evidence in the record that Padgett's payroll forms and paychecks for *Army Wives* were made out to *Perry Padgett* rather than *Frankie Padgett*. Padgett served a subpoena on Cast & Crew for these records. Cast & Crew's counsel responded to the subpoena stating: "Cast & Crew is a payroll company and does not have a personnel file for the claimant. I will get you the paycheck stub they have. You will have to subpoena the company(ies) he worked for to get personnel files." [R.P. 228]. The paycheck stubs produced by Cast & Crew for *Vice Principals* were made out *Frankie Padgett* with Danger Boy Productions as the employer. [R.P. 54].

called *Vice Principals*. For this production, he received his paycheck from Danger Boy Productions, although it apparently was issued by Cast & Crew on behalf of Danger Boy Productions. [R.P. 54].

On May 6, 2015, Padgett suffered a work-related injury to his right leg during the production of *Vice Principals*. He tore his Achilles tendon, for which he required multiple surgeries. Cast & Crew provided workers' compensation benefits to Padgett through its contract with Danger Boy Productions.

On June 23, 2015, Petitioners filed **DEFENDANT'S PETITION TO TERMINATE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AND/OR MEDICAL BENEFITS.** Petitioners raised two grounds to terminate benefits in their petition.

For a first ground, Petitioners alleged that the "$150,000.00 paid to Respondent in resolution of the 2009 claim represented the remaining benefits to be paid [and] The clincher reflects that a total of 375 weeks have been paid with regard to the 2009 claim." [R.P. 26, paragraphs 4 and 5]. Claimant contested this allegation, arguing that per the Form 19 and the clincher itself, the settlement could not be attributed to any amount of compensation or number of weeks. The clincher was not limited to compensation. The terms of the clincher explicitly settled *all* potential issues:

> including but not limited to any consequences whatsoever of any injuries sustained by Claimant in the above-referenced accident of August 27, 2009, whether known or unknown, and including but not limited to any right which Claimant might otherwise have to demand employment or benefits for disability, disfigurement, bodily impairment, medical treatment, medicine or prescriptions, lost time or death, under the Act and specifically including any right which Claimant might otherwise have to demand further benefits by way of compensation or medical care under the Act because of a change in condition hereafter (which right is hereby expressly waived, released and renounced) whether or not arising out of or indirectly in any way conceivably attributable to Claimant's injury by accident as aforesaid and each and every consequence thereof, whether known or unknown. [R.P. 32].

Significantly, the parties entered into the clincher before Padgett had completed medical treatment

or reached MMI. The Single Commissioner rejected this ground.

For a second ground, Petitioners alleged "because Respondent provided misleading information concerning his identity, and as a result willfully violated the express terms of the clincher or settlement agreement and release that he not reapply for an employment position, he is barred from receiving temporary total and medical benefits." [R.P. 27, paragraph 12]. This allegation was made over confusion concerning Padgett's name. His full name is Perry Frank Padgett, Jr. Because his father goes by Perry, Padgett goes by Frankie. Both *Perry Padgett* and *Frankie Padgett* appear in employment records, medical records and workers' compensation records throughout both cases. Although the Single Commissioner expressed concerns over the interchangeability of the two names, she ultimately rejected Petitioners argument that the claim should be barred due to fraud or misrepresentation.

Instead, the Single Commissioner *sua sponte* terminated Padgett's temporary compensation on a ground not raised by Petitioners nor argued at the hearing. The Single Commissioner held:

> Based upon the terms of the settlement agreement and release, Claimant was previously compensated by Cast & Crew for 1,704.56 weeks of benefits (per a mutually agreed to allocation by the parties). As such, Claimant has exceeded 500 weeks of compensation benefits pursuant to the act. Assuming *arguendo*, claimant's prior award did not exceed or reach the 500 week limitation or cap, his receipt of temporary total benefits since May 6, 2015, has resulted in payment of more than 500 weeks of compensation benefits for the same employer. [R.P. 22; Finding of Fact 8].

Padgett appealed to the Appellate Panel.

On November 13, 2017 – following the hearing but prior to issuance of the Decision and Order – Claimant filed a Motion to Submit After Discovered Evidence. Claimant sought to introduce a letter received from Cast & Crew produced by Petitioners after the hearing. The letter confirms Claimant's position that:

> [Cast & Crew, Inc.] are merely a provider of payroll services to the entertainment industry and, in our limited role, we do not directly employ, or control the day-to-day responsibilities of our payroll clients nor their production employees. [R.P. 248].

The Appellate Panel heard the appeal on November 27, 2018. By Decision and Order issued on July 3, 2019. The Panel affirmed in part and vacated in part, ordering that Petitioners "shall immediately reinstatement payment of temporary total disability compensation benefits retroactively and continuing on a weekly basis until further order of the Commission." The Panel vacated the Single Commissioner's findings barring additional compensation. [R.P. 9].

Cast & Crew appealed to the South Carolina Court of Appeals. The court affirmed in an unpublished opinion.

ARGUMENT

I. The Court of Appeals correctly held that the Cast & Crew cannot divest the Commission of jurisdiction [in Response to Petitioners' argument at pages 10-17].

Petitioners contend that there is no employee/employer relationship in this case, such that the Workers' Compensation Commission lacks jurisdiction. Petitioners argue that "the employment contract entered into by Respondent with Cast and Crew in 2015 prevented him from lawfully being employed by Cast & Crew." [Petition, page 10]. The "employment contract" cited by Respondents is the *Settlement Agreement and Release* from Padgett's previous 2009 workers' compensation claim. They specifically refer to a clause stating:

> The parties agree that the Claimant is no longer an employee of Cast & Crew Entertainment Services, Inc. And further agrees that he will not seek future employment with Cast & Crew Entertainment Services, Inc.

[R.P. 34].

The Court of Appeals rejected this argument holding "the substantial evidence in the record supports the Appellate Panel's finding that an employer-employee relationship existed between Claimant and Cast and Crew, despite the Settlement Agreement's prohibition on future employment." The court did not address the myriad legal problems extant in Cast & Crew position.

A. As Padgett was never a direct employee of Cast & Crew, any prohibition on reemployment is inapplicable as a matter of law.

The fundamental flaw in Petitioners' argument is that Padgett was *never* an actual employee of Cast & Crew. Cast & Crew by its own admission is "merely a provider of payroll services to the entertainment industry and, in our limited role, *we do not directly employ*, or control the day-to-day

responsibilities of our payroll clients nor their production employees.[2] [R.P. 228, 248 (emphasis added)]. While Cast & Crew may have been designated as the *de jure* employer for purposes of insurance coverage, Cast & Crew was not the *de facto* employer.

Cast & Crew provides payroll services (including workers' compensation) to production companies producing movies and television programs. Padgett was injured working on *Vice Principals*. The show was produced by Danger Boy Productions, who hired Cast & Crew to be its payroll service. Padgett obtained employment with Danger Boy Productions through the Teamsters union. He did not seek nor did he obtain employment directly with Cast & Crew. His paycheck stubs list his employer as "Danger Boys Productions, LLC (#5287)." [R.P. 53].

Cast & Crew alleges Padgett was employed as a truck driver for Cast & Crew in both 2009 and 2015. In 2009, Padgett was employed by ABC Productions to work on a show called *Army Wives*. When that show ended, his employment ended. In 2015, Padgett was hired through the Teamsters' Union by Danger Boy Productions to work on *Vice Principals*. The mere fact Cast & Crew was the payroll company for both productions does not make them Padgett's *actual* employer.

B. There is no legal basis on which Cast & Crew can void the employee/employer relationship to evade their liability under the Workers' Compensation Act.

Even if Padgett had been directly employed by Cast & Crew, the clause is unenforceable under several statutes as well as being against public policy.

A contractual clause purporting to void a future employee/employer relationship would also

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[2]The Appellate Panel agreed, finding "Cast & Crew's designation as an employer is analgous to an upstream employer being designated as an employer in a statutory employment case and a Professional Employer Organization. In both instances, the upstream contractor and the PEO are entities not directly controlling the daily operations of the employee, nevertheless, each entity is designated as the employer." [R.P. 6, Finding of Fact 3].

violate the terms of the Workers' Compensation Act (let alone the intent) on several grounds. Neither party has the ability to enter into a contract avoiding the Act. Petitioners point to a provision in the 2012 settlement agreement wherein Padgett ostensibly "agrees that he will not seek future employment with Cast & Crew Entertainment Services, Inc." [R.P. 34]. This provision is *void ab initio*, as the Act provides "No contract or agreement, written or implied, . . .shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this title except as otherwise expressly provided in this title." S.C. Code Ann. § 42-1-610 (2007). The Act further states "No agreement by an employee to waive his rights to compensation under this title shall be valid." S.C. Code Ann. § 42-1-620 (2007). *See, also* S.C. Code Ann. § 42-1-130 (2007)(The term "employee" means every person engaged in an employment . . . *whether lawfully or unlawfully employed* . . .)(emphasis added). These statutory provisions prevent an employer from contracting its way out of a workers' compensation claim.

The provision Cast & Crew seeks to enforce is somewhat akin to a covenant not to compete – with the distinct difference that there is no competition or economic loss to Cast & Crew, such that it lacks even the basic purpose of a noncompete agreement. Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer. "An agreement's enforceability depends on whether it (1) is necessary for the protection of the legitimate interest of the employer, (2) is reasonably limited in its operation with respect to time and place, (3) is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, (4) is reasonable from the standpoint of sound public policy, and (5) is supported by a valuable consideration." Rental Uniform Service of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983). The provision in the instant case fails on all counts.

Two companies provide payroll services to these entertainment production companies: Cast & Crew and their competitor Entertainment Services. [R.P. 50-54; 104, lines 4-7; 115 line11-page 116, line 11; 228, 248]. If Cast & Crew could prevent a person – particularly a union member – from working in any production for which it provided payroll services, then it could effectively prohibit people from working in movies and television altogether.

As Padgett is a member of the Teamster's Union hired under a collective bargaining agreement, neither Padgett nor Cast & Crew can enter into a side agreement varying the terms of the collective bargaining agreement. As the United States Supreme Court stated in J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement.

The contractual clause relied on by Cast & Crew is *void ab initio* as it conflicts with the Collective Bargaining Agreement.

Padgett settled a previous workers' compensation claim with Cast & Crew; not a wrongful termination or other employment claim. The mere fact someone got injured on the job is not a valid reason to prohibit that person from continuing employment, particularly in an industry in which only two companies provide payroll services. Indeed, our State's public policy expressly disfavors forcing injured workers to give up their right to continuing employment as a condition of settling a workers' compensation case. "For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for

his current employer until he reaches maximum medical improvement and then, if possible, to return to his previous position." Lee v. Bondex, 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013).

Should the Court grant the Petition, it should find as a matter of law that the contractual provision is *void ab initio* as (1) violates the express provisions of the Act; (2) violates public policy; (3) attempts to alter the collective bargaining agreement; and (4) has no support in the common law. Therefore, the decision of the Court of Appeals should be affirmed albeit with the additional legal analysis presented here.

C. The affirmative defense of Cooper v. McDevitt & Street is inapplicable both legally and factually.

Petitioners seek to create new law allowing them to evade liability based on virtually any inaccurate, confusing or mistaken statement in an employee's new hire paperwork. There is no authority for this proposition. Indeed, it is contradicted by the key part of Cooper – that there must be a causal connection between the misrepresentation and the injury itself. The Court of Appeals correctly rejected this argument.

With one narrow exception the claims and defenses in workers' compensation are entirely based on statute. The lone common law defense is set forth in Cooper. Cooper holds that the employer can void the employment relationship if it can prove: "(1) The employee must have knowingly and wilfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and (3) There must have been a causal connection between the false representation and the injury." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973). Cooper is strictly limited to those situations where the putative employee *misrepresented his physical*

condition to induce a potential employer to hire him knowing that he was physically incapable of doing the job without near certain risk of injury due to the preexisting condition. As such, Cooper has no application to the case *sub judice*.

Moreover, Cast & Crew cannot prove the elements of Cooper. Padgett made no misrepresentations about his physical condition nor did he have a preexisting injury or impairment to his right ankle.

The allegation underlying Cast & Crew's fraud defense is that "Padgett's use of a variation of his legal name on the withholding and employment eligibility forms clearly shows an intent to avoid discovery of his true identity." [Petition, page 14].

Padgett never sought future employment with Cast & Crew. He sought employment with Danger Boy Productions. He learned he would be paid through Cast & Crew *after* he had been hired by Danger Boy Productions.[3] Padgett filled out three payroll forms in 2015. A Form W4 lists Cast & Crew as the employer – which would be Padgett's first notice that Cast & Crew was the payroll service. Conversely, the I-9 lists Danger Boy Productions as the employer.[4] The third form is an application for membership in the local Teamster's chapter with no mention of the employer. [R.P. 56-58]. The W4 is the one document that mentions Cast & Crew – which makes sense since Cast

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[3]The provision in the 2012 settlement agreement merely states: "And [Claimant] further agrees that he will not seek future employment with Cast & Crew Entertainment Services, Inc." [R.P. 34]. It does not prohibit a production company from "hiring" Padgett nor does it prohibit Padgett from accepting wages paid through Cast & Crew.

[4]The I-9 is a federal form used to insure that the employee is a citizen, legal resident or alien permitted to work in the United States. The Form I-9 must be *signed by the employer* attesting "to the best of my knowledge the employee is authorized to work in the United States." The I-9 was signed by a representative of Danger Boy Productions; not Cast & Crew. [R.P. 57-58].

& Crew is the payroll service; not the employer. Everything else, including Padgett's paychecks, designates Danger Boys Productions as the employer. [R.P. 53].

As to the allegation that he previously used a different name, Cast & Crew never introduced any employment or payroll records from the 2009 job on *Army Wives* with ABC Production. We don't know what name was used on the new hire paperwork in 2009 because the employment documents were not produced. Cast & Crew said it could not produce them because they were not the employer (even though they presumably issued the paychecks). [R.P. 228, 248]. We do know the name Frankie Padgett is used on paycheck stubs for *Reckless* (2013), *Identity* (2014) and *South of Hell* (2014). [R.P. 50-53]. All three of these productions predated *Vice Principals* – demonstrating that Padgett did not change his name in 2015 to induce Cast & Crew to hire him.

It is simply not plausible that Case & Crew could ever have been confused about Padgett's identity. He used the same last name, social security number, date of birth and address on all documents. Both claims were administered by the same adjuster: Vivian Hardin. Ms. Hardin signed the settlement documents for the 2009 claim. [R.P. 37]. And Ms. Hardin instructed the Nurse Case Manager to close the claim in July 2017. [R.P. 222]. As the Employer's Representative, Ms. Hardin cannot claim "ignorance of [the alleged] falsity" of Padgett's use of his informal name. S.C. Code Reg. 67-202 A (7)(2007)(defining "Employer's Representative as the "employer's insurance carrier . . ."

The Court of Appeals correctly affirmed the Appellate Panel's holding that Cast & Crew could not divest the Commission of jurisdiction based on substantial evidence. As such, the result is correct. The Court of Appeals affirmed on substantial evidence. Should the Court issue the writ, the Court should address the legal fallacies in Petitioners' argument.

II. As Padgett was not paid more than 500 weeks, the Commission properly exercised its authority in finding Cast & Crew had no legal basis to suspend or terminate compensation [in Response to Petitioners' argument at pages 17-19].

Petitioners argue "Padgett was either paid at most 1,705.56 weeks as reflected in the clincher or at least 220.14793 weeks of permanent disability ($150,000.00 divided by the compensation rate of $681x.36) to which Petitioners are entitled to a credit." [Petition, page 19]. At trial, Petitioners argued that the lump sum clincher payment represented 220.14793 weeks of compensation. The Single Commissioner rejected this argument, instead concluding *sua sponte* that the allocation of the settlement over Padgett's lifetime meant he had been paid 1,704.56 weeks of compensation. The Appellate Panel properly vacated this finding. [FC Order, page 8, Finding of Fact 8].

A. Padgett has not been paid 635.5763 weeks of compensation.

Petitioners contend Padgett has been paid a total of 635.5763 weeks. They are wrong.

The parties settled the 2009 claim for a lump sum payment of $150,000.00. They settled before Padgett completed his medical treatment or reached MMI. This fact is hugely significant because *the lump sum was not a disability award.* Cf. Lemon v. Mt. Pleasant Waterworks, 429 S.C. 59 n. 8, 837 S.E.2d 738 (Ct. App. 2019)("The 199-week offset is also troubling because neither the Single Commissioner nor the Appellate Panel undertook any analysis of the four prior claims to determine whether the injuries for which they awarded the 199-week credit were in any way related to the current claim . . .").

Unlike a settlement on a Form 16, a full and final settlement (colloquially called a "clincher") is not based on any specific number of weeks for a specific body part. There is no specific disability award; no provision for ongoing medical treatment; and no ability to reopen on change of condition. The employer simply pays a sum of money to end all liability for the particular case in much the

same way civil cases are settled.

The clincher in this case explicitly settled *all* potential issues arising under the Act:

> including but not limited to any consequences whatsoever of any injuries sustained by Claimant in the above-referenced accident of August 27, 2009, whether known or unknown, and including but not limited to any right which Claimant might otherwise have to demand employment or benefits for disability, disfigurement, bodily impairment, medical treatment, medicine or prescriptions, lost time or death, under the Act and specifically including any right which Claimant might otherwise have to demand further benefits by way of compensation or medical care under the Act because of a change in condition hereafter (which right is hereby expressly waived, released and renounced) whether or not arising out of or indirectly in any way conceivably attributable to Claimant's injury by accident as aforesaid and each and every consequence thereof, whether known or unknown.

[R.P. 32].

Settlement on a clincher benefitted both parties because it allowed them to settle all ongoing and future issues for a single lump sum.

Further proof that the settlement did not represent a specific number of weeks is shown on the Form 19. The Form 19 shows Padgett was paid 154.857 weeks of TTD. There is no number of weeks listed for "P.P." (permanent partial disability) nor for the Agreement and Final Release. The fact there is no space to allocate any number of weeks for the Agreement and Final Release shows the Commission and legislative intent that a clincher should remain unallocated. This procedure fosters settlement of an entire claim, thus permitting carriers and employers to fix their liability at a set amount with finality. [R.P. 37].

The Appellate Panel properly vacated the findings of the Single Commissioner that the clincher represented a specific number of weeks. This finding is legally correct and supported by substantial evidence. The order below should be affirmed.

B. Padgett has not been paid 1,705.56 weeks of compensation.

The 2012 settlement prorated the net lump sum payment (after attorney's fees and costs) over Padgett's statutory life expectancy. [R.P. 32]. This type of allocation is done solely to preserve the injured worker's social security disability benefits. It has no effect on the employer's liability.

The issue of whether "the Commission has the authority to include language in the order prorating the lump sum award over [a claimant's] life expectancy" was addressed by our Supreme Court in James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010). In James, the Court defined the allocation as "simply a mathematical calculation;" and merely an *accounting method.* The Court explained: "Proration of the lump sum award does not affect the *amount* of the award in any manner." Id.

If an employer – or a payroll company – could use James allocation language as a shield to avoid payment of compensation for a subsequent injury, it would entirely defeat the beneficient purpose underlying the James decision. In James, the Court addressed whether an employer and carrier could use social security allocation language as a bargaining chip. The Court wrote:

> Respondents argue the proration provision is typically part of a negotiated settlement, whereby the employee agrees to give up certain benefits to which they are entitled in exchange for inclusion of this proration language. We find [Employers]'admitted desire to use proration language as a 'bargaining chip' in these circumstances is inappropriate.

James v. Anne's Inc., 390 S.C. 188, 198-199, 701 S.E.2d 730 (2010).

Petitioners' argument should be rejected by the Court on the same grounds.

III. The Opinion of the Court of Appeals is consistent with prior law [in Response to Petitioners' argument at pages 20-23].

Although Petitioners allege that their argument is based on a perceived inconsistency with the opinion in this case and James, their real argument is over the interpretation of § 42-9-170. They

begin their argument by quoting from § 42-9-170, yet leaving out the critical last sentence where it states: ". . . the employee may receive further benefits as provided under the provisions of Section 42-9-35." S.C. Code Ann. § 42-9-170(B)(2007).

A form of § 42-9-170 has been part of the Act since it was passed in 1936 concurrent with the establishment of the Second Injury Fund. The purpose of the Fund was to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995).

The Second Injury Fund was financed by a premium tax on all insurance carriers, self-insurers and the State Accident Fund. S.C. Code Ann. § 42-7-310 (2007). The monies in the Fund were used to reimburse these insurers when an employee's disability was amplified because of a pre-existing medical condition. The insurer would be reimbursed for additional compensation and medical treatment paid past the first 78 weeks. S.C. Code Ann. § 42-9-400 (2007).

Section 42-9-170 complemented the Second Injury Fund. It provided "that the employee may receive further benefits as provided by Sections 42-7-310, 42-9-400, and 42-9-410 if his subsequent injury qualifies for additional benefits provided in those sections." S.C. Code Ann. § 42-9-170 (A) (2007). This allowed an employee to receive up to 500 weeks for a new claim even if he had previously been awarded compensation for a permanent injury in an earlier claim.

The Fund was legislatively eliminated by the amendments to the 2007 Act. The spur to the amendment was this Court's 2006 opinion in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). Ellison held that if the "combined effects" of a preexisting condition and a new compensable injury resulted in greater disability than the injury itself, the employee was

entitled to compensation for permanent total disability." Ellison created an exception to the Singleton "[w]here the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

The reaction to Ellison was swift. The Legislature amended § 42-9-170 and enacted a new statute (§ 42-9-35) to eliminate the "combined effects" exception to Singleton. It also amended § 42-9-400 to prospectively eliminate the Second Injury Fund.

The sentence permitting an employee to "receive further benefits . . . if his subsequent injury qualifies for additional benefits provided in [the Second Injury Fund]" was changed to preserve the right to additional compensation despite the elimination of the Fund. The new sentence provides:

> If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, *except that the employee may receive further benefits as provided under the provisions of Section 42-9-35.*

S.C. Code Ann. § 42-9-170(B) (2007)(emphasis added).

The amended statute reaffirmed the employee's right to receive "additional compensation." To fully understand this, one must go back to Ellison. Ellison held the original statute:

> indicates the legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition.

Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

The concern with Ellison was that the preexisting condition need not have been aggravated by the work injury. Ellison had numerous "pre-existing physical conditions including hypertension,

sleep apnea, prostate cancer, diabetes, and congestive cardiac disease which, in combination with his workplace injury, rendered him physically unable to return to work after his accident." Id. None of these conditions aggravated or were aggravated by his work-related leg injury.

Section 42-9-35 legislatively overruled the combined effects holding by requiring the employee to prove that: "(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury." S.C. Code Ann. § 42-9-35 (A)(2007). The statute preserved the Commission's authority to

> award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

S.C. Code Ann. § 42-9-35 (B)(2007).

The additional compensation was not limited to a scheduled member award if "the subsequent injury [impaired] or affect[ed] another body part or system . . ." Id.

In Ellison, the Court overruled the Court of Appeals because it "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." Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). The Ellison court stated: " 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. " Id.

The same reasoning applies to the Legislature's retention of an employee's right to "receive

further benefits" notwithstanding a preexisting impairment. The requirements may be different with the elimination of the combined effects doctrine, but so long as the employee proves the aggravation, he is entitled to as much as the full 500 weeks for the subsequent injury.

The Legislature balanced the interests of insurers and employees by eliminating the Second Injury Fund and the combined effects doctrine, yet retained the ability of the employee to receive further benefits. Retention of the "receive further benefits" language would be would be "futile unless a claimant could actually make such a recovery in the first place." Id.

To an extent, the above discussion is academic because Padgett was neither compensated for permanent disability in 2009 nor was Cast & Crew his actual employer. Even if he had been awarded permanent disability, he would be entitled to additional compensation *up to 500 weeks* for the subsequent injury under § 42-9-170(B).[5]

For these reasons, Cast & Crew's analysis of § 42-9-170 and James is fatally flawed. Although there is no direct error of law to correct here, the Court may wish to grant the Petition to address prior case law misinterpreting § 42-9-35 and 42-9-170.[6]

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[5]At oral argument before the Court of Appeals, Petitioners' counsel conceded that the 500 week cap on compensation is a *per claim cap*; not a lifetime cap. See S.C. Code Ann. § 42-9-10(A)(2007)(*In no case* may the period covered by the compensation exceed five hundred weeks . . .")(emphasis added). See, also Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699, n.2 (1995)("We note as an aside that a person formerly adjudged totally disabled is not necessarily precluded from compensation for subsequent work-related injuries.. If [a paraplegic awarded total disability] suffers an additional work-related injury that either is a schedule injury (distinct from her paraplegia) or that deprives her of earning capacity, she may recover workers' compensation for that injury, notwithstanding the previous determination and award of total disability.").

[6]For example, in Frampton the Court of Appeals held that § 42-9-35 creates an additional burden for an injured worker to show that his new injury aggravated a preexisting injury even in an accepted case where the employer paid for surgery under the Act. Frampton v. S.C. Dep't of Natural Res., 432 S.C. 247, 851 S.E.2d 714 (Ct. App. 2020).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. In the event the Court issues the Writ, the Court, in its capacity as a law-making court, should address legal issues raised by Respondent.

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com
S.C. Bar 15394

Attorney for Respondent

Columbia, South Carolina
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