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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Op. No. 4876 (S.C. Ct. App. filed January 4, 2012)

Henry Dinkins, ... Petitioner,

v.

Lowe's Home Centers, Inc. -Sumter, SC and
Specialty Risk Services, LLC, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 29, 2012.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Petitioners pre-existing disabilities did not combine with a subsequent work related injury to create greater disability?

2. Did the Court of Appeals err in requiring the new injury to aggravate or be aggravated by the pr-existing disability?

3. Did the Court of Appeals err in holding it need not reach the issue of disability based on the circular logic that Dinkins could not prove the elements of Ellison because he was not disabled; yet also could not reach the issue of whether he had proven his disability because he had not proven the elements of Ellison?

4. Did the Workers' Compensation Commission err in failing to make a ruling based on the proof of the injured worker's unsuccessful work search when it is well established that total disability can be shown by three alternative methods of proof including proof of "diligent efforts to secure employment" and the injured worker was entitled to a ruling on the issue as a matter of law?

STATEMENT OF THE CASE

On January 4, 2012, the Court of Appeals issued an opinion affirming the decision of the Court of Common Pleas which affirmed the Decision and Order of the South Carolina Workers' Compensation Commission. Dinkins v. Lowe's Home Centers, Inc. -Sumter, SC and Specialty Risk Services, LLC, Op. No. 4876 (S.C.Ct.App. filed January 4, 2012)(Shearouse Adv.Sh. No. 1 at 47).

This is an appeal from the Workers' Compensation Commission filed by the Petitioner, Henry Dinkins. Dinkins argued two issues: (1) that his disability should be determined under the economic model because his preexisting injuries at Lowe's combined with his new injury to create

a greater disability under Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006); and (2) that he had proven his total loss of earnings capacity by undertaking a diligent but unsuccessful work search per Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965)(setting out three alternative methods of proof, including the employee's "diligent efforts to secure employment.").

The Appellate Panel misapplied Ellison and rejected the first argument because it found Dinkins was not disabled based on the opinion of Lowe's vocational expert. The Panel never reached the second argument because it completely overlooked the evidence of Dinkins' diligent work search. The Circuit Court affirmed.

The Court of Appeals issued its decision on January 4, 2012. The court held Ellison did not apply because "substantial evidence in the record supports the Appellate Panel's decision that Dinkins did not have a greater disability as a result of the combined effects of his previous injuries and his current injury." Dinkins v. Lowe's Home Centers, Inc. -Sumter, SC and Specialty Risk Services, LLC, Op. No. 4876 (S.C.Ct.App. filed January 4, 2012)(Shearouse Adv.Sh. No. 1 at 47, 54-55). The court further held it not need reach the issue of proof of disability based on its holding that Ellison did not apply. Petitioner seeks a writ of certiorari to review that decision.

The Petitioner, Henry Dinkins, is 63 years old (as of the date of the hearing). He is a high school graduate and has an Associates degree in business. [R. p. 61].

Before moving to South Carolina in 1996, he worked as an operations manager in a bank. When he moved to South Carolina, he searched for work in banking for a year, but was unable to find any work in that field. [R. p. 62].

Dinkins then went to work for Lowe's in April 1999. He started as a Customer Service

Representative. He was promoted to Assistant Department Manager and then to Paint and Home Decor Department Manager. [R. p. 63, ll. 7-19].

On May 1, 2001, Dinkins suffered the first of three major injuries at Lowe's when he injured his left ankle. The claim was accepted. On May 27, 2003, Dinkins underwent a triple arthrodesis (fusion of the ankle). He was released for the left leg injury on October 14, 2003 with a 25% impairment rating from Dr. Belding. The Commission found Dinkins sustained 40% disability to the left leg for this first injury. [R. pp. 2-5, 63-64].

While still under care for the left leg injury, Dinkins suffered a second injury at Lowe's, this time a right knee injury on June 22, 2002. Dinkins underwent surgery for the knee injury. He was released with a 25% rating from Dr. Holmes, the treating physician, along with 4% from Dr. Ekman and 5% from Dr. Zgleszewski. The Commission found Dinkins sustained 30% disability to the right leg for the second injury. [R. pp. 6-11, 64-65].

Dinkins was left with physical limitations from his two leg injuries. The Commission found as a fact that as a result of the left ankle injury, "Claimant continues to experience significant pain, loss of motion and altered gait. . . . Claimant's symptoms continue to cause problems running, jumping, walking, walking on uneven surfaces, negotiating stairs and standing." [R. p. 10]. As to the right leg injury, the Commission found Dinkins had "limitations in his ability to stand, squat and walk due to his injury." [R. p. 3].

After the two leg injuries, Lowes' demoted Dinkins from a manager to a customer service representative to accommodate his physical restrictions. Dinkins applied for administrative positions within Lowe's but was turned down. [R. pp. 79-80, 90-91].

Dinkins suffered a third injury on April 20, 2005 when he injured his back. [R. p. 66]. This

third injury is the subject of this appeal.

Dinkins received treatment from numerous orthopaedic and pain management doctors for his back injury. He continues to require long-term anti-inflammatory medication. The Commission found that as a result of the back injury, "the Claimant's ability to perform work was limited to a sedentary to light duty work status with a lifting restriction of 10 pounds occasionally and restrictions on repetitive bending and twisting." [R. pp. 22, 184-195].

Dinkins last worked for Lowe's on December 5, 2005. Lowe's no longer had a job for him within those restrictions. Lowe's called Dinkins back into work in February 2007, but after confirming his restrictions, the offer of work was withdrawn. [R. pp. 67-70]. Dinkins was told by Lowe's managers that they would call him back, but they never did.

Acting on the assumption that his employment at Lowe's had been terminated, Dinkins began looking for work. Since his restrictions precluded any kind of physical activity, he applied for work in banks and other office environments throughout Columbia, Florence, Camden and Sumter. He was able to get two interviews with banks and one with an insurance company. However, no one offered him a job. [R. pp. 80-83].

Shortly before the hearing on his back injury, Dinkins was evaluated by two vocational experts: Adger Brown and Glen Adams.

Brown opined Dinkins was permanently and totally disabled based on his physical limitations combined with his age and lack of transferable skills. Brown noted Dinkins had an extensive history in banking and finance, but since it had been many years since he worked in that field, he would need to be retrained. He opined that Dinkins' age made retraining unrealistic for an employer. He concluded:

> From a vocational standpoint, it is my opinion, within a reasonable degree of vocational certainty, that Mr. Dinkins is physically incapable of performing any sort of strenuous work as he did in the recent past, and, in terms of significantly lighter jobs, would face such an incredibly restricted labor market and extreme prejudice due to his age, that he would be unhireable for those few jobs he might be physically capable of performing. Because of this catch 22, it is my opinion that Mr. Dinkins is unlikely to reenter the world of work and should be considered permanently and totally disabled. [R. p. 202].

Adams agreed Dinkins could not return to work at Lowe's or any job requiring exertion greater than a light level. [R. p. 158]. He also concurred that "[h]is age will be a limiting factor in obtaining those jobs that are highly skilled." [R. p. 158]. Adams did opine Dinkins qualified for occupations "in the retail industry, including sales positions, clerical office positions, customer service and service provision." [R. p. 158]. He also opined Dinkins qualified to return to positions in the banking and finance industries. [R. p. 158].

Adams went on to opine that:

> A labor market survey was conducted on the factors outlined in this report in order to identify actual jobs for which Mr. Dinkins qualifies. A stable labor market was found to exist in his local labor market in the banking, financial and retail industries. Based on the strength of his prior work history in management positions, as well as the other factors outlined in this report, he is currently employable in his labor market. [R. p. 158-159].

Dinkins continued applying for jobs in the Sumter, Florence, Camden and Columbia areas. [R. p. 80-85]. He applied to every bank in the area. He also asked Glenn Adams for advice, although none was forthcoming. Dinkins read Adams' report and used the report to apply for even more jobs, *including every job listed by Glenn Adams that he was physically capable of doing.* [R. p. 85, l. 15-p. 86, l. 24; p. 88, ll. 5-20]. Dinkins has received no offers. He remains unemployed.

ARGUMENT

This case presents two novel issues of considerable importance to the workers' compensation

bar: (1) application of the "combined effects" rule to pre-existing injuries suffered in the same employment;[1] and (2) the quantum of proof required to prove lost earnings capacity. Certiorari should be granted because these are both novel issues of law. Furthermore, the opinion of the court of appeals directly conflicts with this Court's prior decision in Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006).

Current state of the law

In its 2003 decision in Wigfall, this Court definitively explained the various models of disability compensation in South Carolina's workers' compensation system. The Workers' Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C.Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

The Workers' Compensation Commission is required to apply whichever statute provides the greatest benefits for the injured worker. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). This concept is practically identical to North Carolina's *Doctrine of Munificent Remedy*, which holds "where two remedies are created side by side in a statute, the Claimant should have the benefit of the more favorable." Gupton v. Builders Transport, 357 S.E.2d

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[1]Since this Court's original decision in Ellison, the "combined" effects rule has been applied in several cases – but never to an employee who was healthy when originally hired, and then suffered successive and increasingly disabling injuries with the same employer.

674 (N.C. 1987), quoting 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987). In other words, where a claimant has established entitlement to a greater award under § 42-9-10 or 42-9-20 than he would receive under a scheduled member award, the Commission is required to make the most favorable award. See McLean v. Eaton Corp., 481 S.E.2d 289 (N.C. App. 1997)(error for Commission to award partial permanent disability under scheduled injury statute without assessing whether or not the lost income statute would provide a more munificent remedy).

However, before the Commission can even consider whether the injured worker would be more fairly compensated under the economic model, the claimant must first satisfy the "two-body part" rule. The rule set out in Singleton and affirmed in Wigfall states, "Where 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, even though other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity. To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

There are two exceptions to the rule – either one allows the Commission to make an award for actual loss of earnings capacity under the economic model. The first – not applicable here – is for the original injury to affect an additional body part.[2] The second is the "combined effects" rule set out by this Court in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

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[2]In addition to the Ellison argument at issue on appeal, Dinkins also contended at trial that he suffered from radiculopathy into his leg from his back injury, thus satisfying the two-body part rule. The Commission found as a fact that the radiculopathy had resolved, such that his injury was limited to his back. This factual finding was not appealed beyond the appellate panel.

Under Ellison, the injured worker "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." Id. at 164, 638 S.E.2d at 666.

I. The Court of Appeals erroneously affirmed the Appellate Panel's ruling on Ellison because it overlooked or misapprehended the undisputed fact that Dinkins was both demoted and denied alternative employment specifically because of his preexisting conditions.

The Court of Appeals held:

> The Appellate Panel found Dinkins' knee and ankle injuries did not combine with his current back injury to create a greater disability, and therefore he could not establish total disability based upon section 42-9-400. While the Appellate Panel did not use the preferable language, "combined effects to cause a greater disability,"it did cite the proper case law. We believe it viewed the facts appropriately in light of Ellison II, and substantial evidence in the record supports the Appellate Panel's decision that Dinkins did not have a greater disability as a result of the combined effects of his previous injuries and his current injury. Dinkins v. Lowe's Home Centers, Inc. -Sumter, SC and Specialty Risk Services, LLC, Op. No. 4876 (S.C.Ct.App. filed January 4, 2012)(Shearouse Adv.Sh. No. 1 at 47, 54-55).

The court referenced a finding that "Claimant's current inability to work, **if any**, is secondary solely to his back injury. The knee and ankle injuries he sustained in his previous work-related accidents do not contribute to his disability as defined by § 42-1-10 [sic] in any way; therefore Claimant's reliance on Ellison and § 42-1-400(a) [sic] is misplaced." [Finding of Fact 10, R. page 33 (emphasis in original)].

In no way is this a true "finding of fact" on the elements of Ellison. It never touches on the applicability of § 42-9-400 to preexisting impairments. It is a conclusion of law – and an erroneous one at that. The Commission's analysis would eviscerate the fundamental holding of Ellison. It

essentially holds that an employee cannot combine his preexisting impairments if he is able to work *in some capacity* despite those impairments.

Furthermore, it compounds the error the Commission made in its interpretation of § 42-9-10. The Commission found that Dinkins had not suffered an actual loss of earnings capacity under § 42-9-10. This was error because the Commission failed to consider the evidence of Dinkins' diligent work search as proof of lost earnings capacity. Having done so, the Commission and the Court of Appeals worked backwards to find Ellison and § 42-9-400 inapplicable – thus depriving Dinkins of the proper remedy for his disability as well as creating an incorrect precedent in a published case..

This is not the correct analytical approach under Ellison. The Ellison analysis looks at the nature of the injury and the pre-existing impairments. It does not – at this initial stage – analyze whether a future loss of earnings has actually occurred. Determining loss of earnings capacity is the second stage of the analysis – done after a showing that there has been a combined effect of the injury and preexisting conditions hindering an employee's ability to work.

The Court of Appeals erred in following the Commission's faulty reasoning. Dinkins met all requirements to proceed under Ellison. His pre-existing conditions explicitly meet the definition for a "hindrance or obstacle to employment or reemployment" set out in the statute. See S.C. Code Ann. § 42-9-400(d) (2005)(defining a hindrance or obstacle to employment as any preexisting condition which is permanent in nature and would qualify for 78 weeks of compensation). The Appellate Panel's findings are legally incorrect and unsupported by substantial evidence. Moreover, the finding on disability under § 42-9-10 is controlled by legal error, specifically the fact the Appellate Panel failed to consider Dinkins' unsuccessful work search as conclusive proof of disability.

The facts necessary to bring this case under Ellison are conclusively established. The Supreme Court stated, "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 preexisting condition." Ellison, 371 S.C. at 164, 638 S.E.2d at 666.

Here, Dinkins had two pre-existing conditions, both of which resulted in substantial disability. As to the May 1, 2001 left ankle injury, the Commission had previously found as a fact that, "Claimant continues to experience significant pain, loss of motion and altered gait." The Commission further found, "Claimant's symptoms continue to cause problems running, jumping, walking, walking on uneven surfaces, negotiating stairs and standing." [R. p. 10]. As to the June 22, right knee injury, the Commission previously found Dinkins had "limitations in his ability to stand, squat and walk due to his injury." [R. p. 3]. The Commission had no ability to alter these findings in the April 2005 back injury case. Cf. Curiel v. Environmental Management Services (MS), 376 S.C. 23, 655 S.E.2d 482 (2007)("The Commission erred as a matter of law in failing to consider Claimant's pre-existing impairment in his left eye in combination with the injury to his right eye in determining his impairment [sic] rating.").

In its use of the term "greater disability" in Ellison, the Supreme Court meant "of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the employee should become unemployed." S.C. Code Ann. § 42-9-400(d) (2005). The first two injuries caused a substantial level of disability – serious enough to compel Lowes' to demote Dinkins from department manager to customer service representative. Thus, not only did Dinkins have substantial physical limitations from his leg injuries, they also caused him to lose his

managerial position – and later be denied reemployment in an administrative position.[3] As such, Dinkins went well beyond the normal standard of proof of merely showing that the preexisting condition created physical restrictions – he actually showed that those physical restrictions constituted "a hindrance or obstacle to obtaining employment" with Lowes'. [R. pp. 79-80, 90-91].

As to the findings made by the Commission, the above Ellison analysis shows that the Commission's finding is legally incorrect and unsupported by the evidence. At most, it is technically correct to state that Dinkins lost his light-duty customer service job at Lowes' (a job provided as an accommodation for his previous leg injuries) specifically because of his back injury – and, thus, the reference to his "*current* unability to work." However, his current inability to find gainful employment is a combination of the restrictions from his back injury and his preexisting leg injuries. The Ellison analysis is not limited to finding why an injured worker lost his *last* job – particularly when the last job was sheltered employment made as an accommodation for a previous work-related injury with the same employer. See Peoples v. Cone Mills Corp., 342 S.E.2d 798, 805 (N.C. 1986)("an injured employee's earning capacity must be measured not by the largesse of a particular employer, but rather by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity.").

The Appellate Panel never conducted an Ellison analysis. Instead, it first made an incorrect finding that "Claimant failed to satisfy his burden of proof he is entitled to compensation for loss of earning capacity pursuant to § 42-9-10 or § 42-9-20 as a result of his April 20, 2005 work-related

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[3]Dinkins testified he did not get the administrative job specifically because, "I was told that because of the injury that I had on the knee and all that I wasn't entitled – that I wouldn't be qualified for that position." [R. p. 80, lines 3-10].

accident" based entirely on the Employer's vocational evaluation. As noted at pages 14-18 of Petitioner's Brief and pages 1-6 of Petitioner's Reply Brief, the Appellate Panel erred by failing to consider the proof shown by Dinkins' diligent and unsuccessful work search. Having made this error, the Appellate Panel then worked backwards to conclude Ellison did not apply.

It appears that the court of appeals may have affirmed the Appellate Panel based on this Court's reversal in Bartley v. Allendale Cnty. Sch. Dist., 392 S.C. 300, 709 S.E.2d 619 (2011). The concern here is not whether reversing the court would usurp the Commission's role as fact finder – the Commission made no true findings of fact on the elements of Ellison. Moreover, as the essential facts were previously established by the Commission's orders in Dinkins' earlier claims for injury to his left ankle and right knee, this Court can find the elements of Ellison are met as a matter of law.

In Bartley, the Supreme Court reversed because "the Commission has not considered Bartley's claims applying the proper legal standard and has not made specific factual findings as to Bartley's other conditions because it made an initial determination that they could not be considered." Id. at 310, 709 S.E.2d at 624. The Appellate Panel made a similar error here. It did not apply the proper legal standard. It did not make specific factual findings – or if it did, those factual findings are unsupported by substantial evidence. It simply cannot be said Dinkins' preexisting injuries did not constitute "a hindrance or obstacle to obtaining employment" when the undisputed facts show Dinkins' was both demoted and denied alternative employment specifically because of his preexisting conditions. [R. pp. 79-80, 90-91].

The Court of Appeals repeated the same error it made in Bartley. As this Court explained:

> In Bartley it appears the Court of Appeals focused on whether Bartley's 2002 accident caused her other medical conditions or whether it aggravated her pre-existing conditions. However, in Ellison II this Court held that aggravation was not a

> requirement but an alternative analysis: '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 preexisting condition.'" Id.

The Court of Appeals relied on a part of the Appellate Panel's order which "cites a doctor's report which states the back injury is a 'separate and distinct' injury from Dinkins' ankle and knee injury." Dinkins v. Lowe's Home Centers, Inc. -Sumter, SC and Specialty Risk Services, LLC, Op. No. 4876 (S.C.Ct.App. filed January 4, 2012)(Shearouse Adv.Sh. No. 1 at 47, 54). The *separate and distinct* language is precisely what makes this an Ellison case. Had the back injury not been separate and distinct, it would have aggravated or been aggravated by the ankle and knee injury – such that it would have *affected* those other body parts. Ellison would not be an issue because Dinkins could proceed under the economic model under Singleton. See Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)("To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected.").

Bartley controls here – except that here the evidence supporting application of Ellison is dispositive. Respectfully, this Court should reverse the holding of the Court of Appeals that Ellison does not apply. The Court should further address the issues raised by Dinkins on the extent of his disability under S.C. Code Ann. § 42-9-10 (2005).

II. The Court of Appeals erroneously affirmed the Appellate Panel's ruling on *Ellison* because it overlooked or misapprehended the statutory definition that Dinkins' preexisting ankle and knee injuries are presumed to constitute a "permanent physical impairment" under S.C.Code Ann. § 42-9-400(d)(2005).

The analysis in Ellison is based on the statutory interpretation of S.C. Code Ann. § 42-9-400 (2005). As the Supreme Court explained: "The language of § 42-9-400(a) and (d) 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." Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006).

§ 42-9-400(d) contains this provision applicable to this case:

> When an employer establishes his prior knowledge of the permanent impairment, then there shall be a presumption that the condition is permanent and that a hindrance or obstacle to employment or reemployment exists when the condition is one of the following impairments:
>
> (17) Ankylosis of joints;[4]
>
> (34) Any other pre-existing disease, condition or impairment which is permanent in nature and which:
>
> (a) Would qualify for payment of weekly disability benefits of seventy-eight weeks or more under § 42-9-30 . . . [5]

S.C. Code Ann. § 42-9-400 (2005).

This statutory presumption plainly applies to the facts of this case. As such, Dinkins met the requirements to seek a general disability award under Ellison.

Respondents concede the presumption should have been applied to this case. However, they contend "because Claimant did not raise this presumption below, it is not preserved for appellate review." [Brief of Respondents, page 13, note 2]. If the statutory presumption is applied to the facts of this case, the Commission's ruling is plainly erroneous. This means the Court of Appeals *affirmed a clear error of law in a published opinion.* Not only is this a harsh result for Henry Dinkins; it also creates a misleading precedent that conflicts with a clearly written statute, thus

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[4]The parties agree the "triple arthrodesis" performed on Dinkins's left ankle meets the ankylosis requirement. [Brief of Respondents, page 13, note 2].

[5]Dinkins received weekly disability benefits of 78 weeks for his left ankle injury and 58.5 weeks for his right knee injury. [R. p. 5, 11].

leading to confusion for bench and bar.

In candor to the Court, it is conceded that the statutory presumption was not argued in those specific terms to the Appellate Panel. However, the issue preservation rules require that the *issue* be raised and ruled upon; not necessarily that specific terms be used in an argument. Dinkins is not raising a new issue – the application of Ellison and § 42-9-400 has always been the central issue in this case and that is what is being addressed here. See Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010)(finding argument sufficiently preserved for review because lack of reference to a particular term in argument to trial court was not fatal to appellate argument).

A reviewing court has the ability and authority to reframe the issue and apply the controlling law. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(Toal , C.J., concurring)("I concur in the majority's decision to reverse this [workers' compensation] case, but I write separately because I would resolve the case on different grounds."). "Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue." It is enough that "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011)

Those requirements have been met. This Court should apply the statutory presumption and hold the Court of Appeals erred in holding Ellison and § 42-9-400 did not apply to this case.

Even if the Court holds the statutory presumption is not preserved, the statute still retains dispositive value in the decision. Workers' compensation is a creature of statute. Ellison is based on interpreting the statute. The specific language referenced in Ellison is found at § 42-9-400(d). The Appellate Panel erred in failing to apply the statutory definition. Regardless of the presumption,

the statute clearly defines the permanent preexisting conditions suffered by Dinkins as hindrances or obstacles to employment or reemployment. The issue was argued by both sides using those specific words from the statute. [Brief of Petitioner at 10-11; R. pp. 101, l. 15-p. 102, l. 7]. The Appellate Panel committed legal error in failing to apply that standard (as did the circuit court and the Court of Appeals). Therefore, Petitioner respectfully requests this Court reverse and find Dinkins proved his preexisting conditions were a hindrance to employment as a matter of law, thus bringing this case under the ambit of Ellison.

III. The Court should grant the Petition for Writ of Certiorari to correct the analysis done by the Court of Appeals and reach the issue of whether Dinkins diligent work search proved his permanent and total disability as a matter of law.

The Court of Appeals never reached the issue of whether Dinkins had proven the fact of his total loss of earnings capacity by a diligent but unsuccessful work search. The court held Dinkins could not prove the elements of Ellison because he was not disabled; yet it also held he could not reach the issue of whether he had proven his disability because he had not proven the elements of Ellison. This is chicken or egg reasoning – you never get to the right answer.

This Court should grant the Petition for Writ of Certiorari for two reasons: (1) the Court must reverse the erroneous reasoning which led the Court of Appeals into a logical trap; and (2) the issue of proof of disability by a diligent job search has not been addressed in nearly fifty years and never when there was also expert testimony.

It is critical that this Court appreciate exactly what is at issue here. This is not a case where the Commission simply weighed competing evidence and picked the evidence it preferred. This is a case where the Commission completely overlooked dispositive proof of disability that our Courts

have stated the Commission *must* consider. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965)(setting out three alternative methods of proof, including the employee's "diligent efforts to secure employment."). Cf. Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App.1999)(Commission must consider all the evidence in the record when developing its findings of fact).

The Commission is required to rule on all issues before it. It is not legally sufficient for the Commission to consider only one of the two methods of proving his case submitted by Dinkins. Our courts have universally vacated orders which failed to specifically address facts essential to a proper determination of the issue. See, e.g. Gray v. Laurens Mill, 231 S.C. 488, 99 S.E.2d 36 (S.C. 1957)(remanded because commission made no specific findings on whether Claimant had reasonable excuse for failing to provide timely notice of injury); DiMaria v. Multimedia, Inc., 308 S.C. 387, 418 S.E.2d 324 (Ct. App.1992)(remanded because commission made no specific findings on whether trip on which employee was injured was work related or personal). As a matter of law, the Commission must make a finding as to whether or not the diligent work search conducted by Dinkins proved "his inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). This omission requires a remand with instructions to consider the evidence concerning Dinkins' unsuccessful search for employment and make appropriate findings of fact and conclusions of law.

It is well established that an injured worker can prove loss of earnings capacity by a diligent, but unsuccessful work search. See Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). Coleman sets out three alternative methods of proof (1) expert vocational testimony; (2)

testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment." Id. Any one of these methods will suffice.

Respondents state "Claimant attempts to fashion Coleman as establishing an *absolute* rule that the Commission must find earning incapacity when the claimant testifies that he engaged in a diligent job search with no success, and the failure of the Commission to do so warrants remand." [Brief of Respondents at 25 (emphasis added)]. The rule sought to be applied here is simply the rule the Supreme Court itself set out in Coleman and Shealy, to wit: the Commission must find earning incapacity when the claimant's "periods of unemployment were attributable to an injury produced limitation on, or impairment of, his capacity to work [as shown] by evidence that claimant had made reasonable efforts to obtain employment and had failed because of an injury produced handicap." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 113, 156 S.E.2d 646, 649 (1967).

In the instant case, Dinkins unquestionably cannot return to work at Lowe's nor to any similar occupation. His injuries and physical restrictions prevent him from doing that. Had Dinkins been capably only of physical work such as he did at Lowe's, then without question he would be permanently and totally disabled. In this respect, his situation is identical to the injured worker in Coleman. There, the Court observed, "The uncontradicted medical evidence is to the effect that following and as a result of his injury he is no longer able to perform the duties incident to his regular vocation. He was refused further employment in such capacity by his employer and told that the employer had no light work which he was able to perform." Coleman v. Concrete Products, Inc., 245 S.C. 625, 629, 142 S.E.2d 43, 45 (1965).

The complication here is that Dinkins did perform banking work in the remote past (15 years

ago).[6] As such he *may* have transferable skills that *might* allow him to obtain similar employment today. The issue the Commission had to decide is whether Dinkins could *actually* obtain such employment in the open market. Merely because Lowe's vocational expert theorized that such a market exists is not enough for the Commission to conclude, without more, that Dinkins would actually be able to find such a job in the open market. The proof is in the pudding. If Dinkins presents evidence that he conducted a diligent job search – as he did – the Commission is bound as a matter of law to consider it. Shealy at 110, 156 S.E.2d at 648 ("It is the duty of the Commission to make specific findings upon which a claimant's entitlement to compensation may rest and upon which the amount of compensation due him may be calculated by one of the statutory formulae."). Furthermore, if his unsuccessful job search is made with "reasonable effort," Dinkins would then have proven total loss of earnings capacity as a matter of law. See Coleman v. Concrete Products,

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[6]Dinkins previous employment in banking was as an operations manager. He has not worked in banking in over 15 years. The banking industry, particularly at the operational level, has undergone enormous change during that time. Dinkins may very well be capable of being retrained to handle 21st century technology, but few if any employers in today's economy would be willing to make such an investment for a man of Dinkins' profile. As Adger Brown opined:

> . . . I think this man is permanently and totally disabled. . . . As far as doing anything lighter and capitalizing on his prior skills, I think his age seriously mitigates against him. Any company that wants his finance skills is not going to want to hire someone that they have to retrain and bring up to speed just to have him retire, and companies having jobs requiring fewer skills would pass him over in favor of younger, more physically able individuals. [R. p. 196].

Glenn Adams concurred, stating, ""His age will provide to be a limiting factor in obtaining those jobs that are highly skilled . . ." [R. p. 158]. See Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (S.C.App. 2003)(claimant's age is proper factor to consider in determining if a reasonably stable employment market exists).

The claimant in Shealy had also done other work (auto repair) fifteen years before his injury. However, Shealy never even looked to work as an auto mechanic; whereas Dinkins tried to find jobs in banking as well as apply for every other job Glenn Adams opined he was qualified to do. [R. p. 85, l. 15-p. 86, l. 24; p. 90, ll. 5-20].

Inc., 245 S.C. 625, 142 S.E.2d 43 (1965); Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996)(The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability).

Coleman and Shealy demonstrate that, where the other evidence of total disability is equivocal, the dispositive test is whether the claimant made a diligent job search. In Coleman, "between the date of his discharge by the doctor in October and the date of the hearing the following January, a period of approximately three months, he not only repeatedly sought employment with respondent, which was refused, but sought employment through the South Carolina State Employment Service and some eighteen other possible or potential employers." Coleman at 630, 142 S.E.2d at 45. Coleman's testimony was sufficient for the Supreme Court to conclude: "we think the employee has proved that he has made not only reasonable, but diligent efforts to secure employment." Id.

Conversely, the employee in Shealy did not make a reasonable effort to find employment. Shealy "admitted that he had applied for only two of the six or seven jobs on which he had been employed since his discharge. He made only two other references to any effort to obtain employment." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 112, 156 S.E.2d 649 (1967). Unlike Dinkins, Shealy made no effort to find work in the field in which he was previously employed 15 years before his injury (auto mechanics). The court concluded: "Quite clearly this meager testimony has no tendency to establish that claimant's failure to secure work in either instance resulted from any injury produced physical impairment." Id.

In the instant case, the Commission was presented with testimony comparable to, if not stronger, than the testimony in Coleman. It was legal error for the Commission to fail to consider

this testimony. "The absence of any findings to support the Commission's denial leaves this Court no way of evaluating the reasoning behind the Commission's decision." See Pack v. State Dept. of Transp., 381 S.C. 526, 673 S.E.2d 461 (Ct.App. 2009); Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995)(holding when an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings).

The Court should reject the Respondents' contention that the Commission's findings are supported by substantial evidence simply based on a weighing of the vocational reports. Dinkins is entitled to have the Commission consider all the evidence he presented. The Commission's finding of fact on this issue shows the vocational report from Glenn Adams was the sole determining factor in the Commission's decision:

> The Claimant's vocational evaluation, determined that based on the strength of the Claimant's prior work history in management positions, as well as the other factors, the Claimant is employable in his labor market. (Defendants' APA #8, page 83-84). [R. p. 34].

The Commission did not weigh Dinkins' testimony about the diligent job search; they *completely overlooked* it. This is the important distinction the Court must appreciate. This is not a simple substantial evidence case, but a case where the Commission failed to make any findings on a specific element of the proof presented. See Fox at 280, 461 S.E.2d at 394 (commissioner failed to make findings on 4 of 6 elements thus "it is impossible to know what facts he relied upon.").

Respondents argue that regardless of Dinkins' inability to find employment in a different field than the one in which he had been injured, the vocational assessment by Glen Adams alone is substantial evidence to support the Commission's finding. Essentially, Respondents contend

Adams' report trumps Dinkins' unsuccessful job search. The reality is just the opposite. Because Adams' report is essentially a hypothetical opinion, his hypotheses is trumped by the real world job search. Hypothetically, Dinkins might be employable in the banking and finance field. In reality – and as predicted by Adger Brown – Dinkins' physical limitations, age, outdated skills, and absence from the finance field for over a decade render him unemployable in the open market. See Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996)(The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct.App. 2003)(claimant's age and transferable skills are proper factors to consider in determining if a reasonably stable employment market exists). He proved this by conducting a reasonable job search.

The Commission made no finding, one way or the other, on the fact that Dinkins could not get hired in the jobs for which Adams opined he was employable. This was legal error. It is one thing to rely on expert vocational testimony as the basis for a decision; it is something else when the trier of fact ignores evidence that completely undermines the basis of the expert opinion, particularly when the Supreme Court has explicitly endorsed an unsuccessful job search as proof of total disability. See Stallcup v. Carolina Wood Turning, Co., 7 S.E.2d 550 (N.C. 1940)(Seawell, J. dissenting)("How far the Industrial Commission may be indulged in refusing to believe credible testimony is still to be worked out, but its arbitrary disregard of positive testimony and the substitution therefor of mere speculation is within the power of review and correction by this Court.").

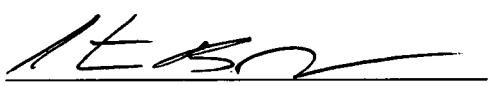
Therefore, this Court should grant the Petition for Writ of Certiorari to remand this case to

the Commission with instructions to consider the testimony of Dinkins regarding his unsuccessful work search – particularly on the jobs for which Adams had opined he was employable – and to make new findings of fact consistent with the evidence proving Dinkins has suffered a total loss of earnings capacity. The Commission should also be directed to consider the vocational report of Adger Brown which was overlooked in its previous Order.

CONCLUSION

For the foregoing reasons and the reasons previously raised in the Briefs and Petition for Rehearing, this Court should grant the Petition for Writ of Certiorari on all issues raised before the Court of Appeals. This case presents more than just errors of law on the essential legal elements of the case, but also requires correction of the circular reasoning of the Court of Appeals which led that court to fall into a logical trap wherein Petitioner was denied rulings on the issues he had appealed.

Respectfully Submitted,



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