THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from the South Carolina Workers' Compensation Commission

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Opinion No. 5020 (S.C. Ct. App. filed August 8, 2012)

Ricky Rhame,

Petitioner,

v.

Charleston County School District,

Respondent.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I. Where the Petitioner did not notice his appeal to the Court of Appeals within 30 days after his receipt of the subject decision by an Appellate Panel of the South Carolina Workers' Compensation Commission, but rather first filed a petition for rehearing with the Commission and thereafter noticed his appeal to the Court of Appeals within 30 days after that petition was dismissed by the Commission, did the Court of Appeals correctly dismiss the Petitioner's appeal as untimely because the Petitioner's petition for rehearing by the Commission was improper and did not stay the time for appeal to the Court of Appeals?

II. Should this Court certify this case to explain how the 2007 amendments to the Workers' Compensation Act will apply to an injury that straddles the effective date of those amendments?[1]

COUNTER-STATEMENT OF THE CASE

The Claimant/Petitioner, Ricky Rhame ("Petitioner"), filed a Form 50 with the South Carolina Workers' Compensation Commission ("Commission") on September 29, 2009 alleging that he sustained a compensable injury by accident to his back and neck on May 4, 2009. (App. p. 133.) The Petitioner alleged that "[he] sustained a back injury from repetitively picking up heavy AC units," and stated that he gave notice of the injury to his employer, the Respondent, Charleston County School District ("Respondent"), on May 4, 2009. (App. p. 133.) The Respondent filed a Form 51 denying the injury alleged and asserted notice and statute of limitations defenses. (App. p. 134.) On November 18, 2009, in the Petitioner's pre-hearing brief, he amended his Form 50 "[t]o reflect repetitive trauma for the nature of the injury." (App. p. 136.)

[1] Although this question was not explicitly presented in the Petition for a Writ of Certiorari, it was implicitly raised in the arguments. (Pet. pp. 1 & 4.) The Respondent stated its disagreement to this question being raised in its Return to Petition for a Writ of Certiorari. (Return pp. 4-6.). The Respondent includes this question in the present brief solely out of an abundance of caution because the Petitioner has included the question in his brief. (Br. p. 1.)

This case was heard before Commissioner Avery Wilkerson ("Single Commissioner") on December 3, 2009. (App. p. 107.) At the hearing before the Single Commissioner, the Petitioner argued that he was entitled to compensation for a repetitive trauma injury pursuant S.C. Code Ann. § 42-1-172. (App. p. 206, line 15 – p. 207, line 18.) The Respondent argued, among other defenses, that the Petitioner failed to provide proper notice and failed to timely bring his repetitive trauma injury claim within two years of when he knew or should have known that his injury was compensable. (App. p. 207, line 19 – p. 208, line 16.)

On February 26, 2010, the Single Commissioner found that "the [Petitioner] suffered a compensable repetitive trauma injury on or about May 5, 2009, to his back, right hip, and right lower extremity arising out of and in the course and scope of his employment with Charleston County Schools." (App. pp. 113-14, ¶ 4.) The Single Commissioner also found that the Petitioner "provided timely notice to his employer of the repetitive trauma work injuries" and "filed his workers' compensation claim within the applicable statute of limitations." (App. p. 114, ¶¶ 8 and 10.) The Single Commissioner concluded that the Petitioner suffered a compensable repetitive trauma injury under § 42-1-172. (App. p. 115, ¶ 4.)

On March 1, 2010, the Respondent timely filed a Form 30 Request for Commission Review of the Single Commissioner's decision and asserted, among other errors, that the Single Commissioner erred in finding that the Petitioner filed his claim within the applicable statute of limitations. (App. pp. 142-43.) The Petitioner did **not** file a Form 30 Request for Commission Review of the Single Commissioner's decision asserting that the incorrect law was applied. The parties submitted briefs to the

Commission, and on May 17, 2010, an Appellate Panel of the Commission heard the matter. (App. pp. 117 & 144-163.)

On August 6, 2010, by unanimous vote, the Appellate Panel reversed the Single Commissioner's decision and made its own findings of fact and conclusions of law. (App. pp. 117-131.) The Appellate Panel found that the Petitioner "was aware that he had a back injury related to his job with the [Respondent] since 1994 or 1995" and "was aware of the existence of a Workers' Compensation system by no later than 2006." (App. p. 129, ¶¶ 2 and 8.) The Appellate Panel found that the Petitioner "was not coerced into waiting to file a claim and was never told he would be laid off if he brought a claim or that his claim would be taken care of." (App. p. 130, ¶ 9.) After finding that the Claimant "did not file a Workers' Compensation claim within two years of when he knew or should have known that his claim was compensable," the Appellate Panel denied the Claimant's claim for a repetitive trauma injury to his back because of his "failure to timely file a claim." (App. pp. 130-131.) The Petitioner received the Appellant Panel's decision on August 9, 2010. (Br. p. 2; App. p. 165.)

The Petitioner did not appeal to the Court of Appeals within 30 days of his receipt of the Appellate Panel's decision, but rather, on September 8, 2010, the Petitioner filed a petition for rehearing with the Commission. (App. pp. 164-170, 299-300.) The Respondent filed its reply to the petition on September 14, 2010. (App. pp. 171-179.) Among its arguments, the Respondent asserted that the Commission did not have the authority to rehear a matter which had already been reheard by the Commission at the Appellate Panel hearing. (App. pp. 173-175.) On September 20, 2010, the Commission dismissed the petition. (App. p. 132.)

On October 21, 2010, more than 30 days after his receipt of the Appellate Panel's decision, the Petitioner served and filed his notice of appeal to the Court of Appeals. (App. p. 180.) By decision filed August 8, 2012, a unanimous panel of the Court of Appeals dismissed the Petitioner's appeal as untimely, holding that petitions for rehearing are not applicable in matters before the Appellate Panel; thus, the Petitioner's petition for rehearing did not stay the time for the Petitioner to appeal to the Court of Appeals, and the Petitioner's notice of appeal on October 21, 2010 was well after the applicable deadline. (App. pp. 1-6.) The Court of Appeals denied the Petitioner's ensuing petition for rehearing by order filed September 20, 2012. (App. pp. 7-13.)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of the Commission's decisions and establishes the "substantial evidence rule" as the standard for reviewing the Commission's factual findings. S.C. Code Ann. § 1-23-380 (Supp. 2013); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). An appellate court can reverse or modify the Commission's decision only if the Claimant's "substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); see § 1-23-380(5)(d),(e).

"The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001). "Where there is a conflict in the evidence, . . . the findings of fact of the Commission are conclusive." Id. at 492-93, 541 S.E.2d at

528. "[W]hether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007) (*citing* Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006)).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DISMISSED THE PETITIONER'S APPEAL AS UNTIMELY.

A. The Administrative Procedures Act does not allow a petition for rehearing by the Commission following a decision by the Appellate Panel.[2]

There is no question that the Petitioner did not notice his appeal to the Court of Appeals within 30 days of his receipt of the Appellate Panel's decision.[3] Accordingly, there is no question that, unless the Petitioner's petition for rehearing by the Commission was proper and stayed the time for appeal to the Court of Appeals, the Court of Appeals correctly dismissed the Petitioner's appeal as untimely. *See* Rule 203(b)(6), SCACR; Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 668 S.E.2d 795 (2008) (recognizing that, under the present law, failure to file and serve the notice of appeal on the agency and all parties of record would result in the Court lacking jurisdiction over the appeal); *cf.* Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct. App. 1999) (holding failure to file the notice of appeal with the court within 30 days deprives the appellate court of jurisdiction).

As even the Petitioner has acknowledged in the record, nothing within the South

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[2] This section of the Brief of Respondent corresponds to Argument I.1 in the Brief of Petitioner.

[3] Again, the Petitioner noticed his appeal on October 21, 2010, after having received the Appellate Panel's decision more than two months prior on August 9, 2010. (App. pp.

Carolina Workers' Compensation Law ("Workers' Compensation Act") authorizes the Commission to rehear a matter already heard by the Appellate Panel.[4] Indeed, the Appellate Panel review itself is a rehearing. *See* S.C. Code Ann. § 42-17-50 (Supp. 2013). Section 42-17-50, titled "Review and rehearing by the Commission," provides that a party may apply for "commission review" within 14 days of notice of the award. At that point, the Commission will "**review** the award," "**reconsider** the evidence," "**rehear** the parties," and "if proper, amend the award." (emphasis added). Section 42-17-50 therefore provides for rehearing via Appellate Panel review. After that, an aggrieved party may opt for judicial review under S.C. Code Ann. § 42-17-60 (Supp. 2013).[5]

Notably, while providing for judicial review therefrom, § 42-17-60 expressly provides that awards from the Commission upon review under § 42-17-50 are "conclusive." The "conclusive" nature of such awards is underscored by the Commission's regulations, which expressly provide that the Commission "will not address a motion involving the merits of a claim . . . ." 25A S.C. Code Regs. 67-215

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165 and 180.)

[4] (App. pp. 299-300) (correspondence from the Petitioner's counsel filing his petition for rehearing with the Commission and acknowledging that "the Commission does not have a regulation which governs petitions for rehearing")

[5] In pertinent part, § 42-17-60 provides:

> The award of the commission, as provided in Section 42-17-40, if not reviewed in due time, or an award of the commission upon the review, as provided in Section 42-17-50, is conclusive and binding as to all questions of fact. However, either party to the dispute, within thirty days from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not after, whichever is the longest, may appeal from the decision of the commission to the court of appeals. . . .

(Supp. 2013). *See also* Nettles v. Spartanburg County Sch. Dist. #7, 341 S.C. 580, 588, 535 S.E.2d 146, 150, n. 4 (2000) ("An aggrieved party may not challenge the commission's decision with a motion to the commission, but only with an appeal to the circuit court. *See* S.C. Code Ann. § 42-17-60 (Supp. 1999) ("The award of the commission . . . is conclusive and binding as to all questions of fact."); S.C. ADC 67-215 ("[The Commission] will not address a motion involving the merits of a claim . . . .")).[6] Indeed, the Nettles decision was favorably cited by this Court in Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 324, 713 S.E.2d 267, 274, n. 4 (2011) for the proposition that "**workers' compensation law does not contain a motion to reconsider**; rather, **a party must appeal**." (emphasis added). Further still, this "Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). In this regard, the Respondent would note that the Commission "dismissed" the Petitioner's petition for rehearing. (App. p. 132.)

Notwithstanding, the provisions of the Worker's Compensation Act providing for Appellate Panel review with an appeal thereafter to the Court of Appeals (not a rehearing by the Commission), the Petitioner contends that the Administrative Procedures Act ("APA"), not the Workers' Compensation Act, "governs the process of appealing an agency's decision to an appellate court," and, in so doing, actually governs proceedings, not just in the court system on judicial review, but proceedings still before the Commission by authorizing a petition for rehearing by the Commission. (Br. p. 5.) In support of his position that the APA "controls" in this way, the Petitioner cites Lark v.

[6] See also Stone v. Roadway Express, 367 S.C. 575, 582, 627 S.E.2d 695, 699 (2006)

Bi-Lo, Inc., 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981).

Lark, however, only establishes that the APA "governs the standard of judicial review of awards of the [Commission]"[7] (i.e., once those decisions are in the court system on judicial review). Lark does not establish that the APA governs proceedings still before the Commission so as to control over the Workers' Compensation Act and its statutes directly applicable to the "Awards Procedure" in the Commission (*see generally* Chapter 17 of Title 42 of the South Carolina Code of Laws), particularly § 42-17-50 (addressing "Review and rehearing by Commission") and § 42-17-60 (addressing "Conclusiveness of award; appeals; payment of compensation during appeal; accrual of interest").

Indeed, the pertinent question examined by the Lark Court was whether the APA reflected the legislature's implicit repeal of "the scope of review in Workmen's Compensation cases as set forth in Section 42-17-60." 276 S.C. at 134, 276 S.E.2d at 306. The Lark Court expressly noted that "the principle that repeal of a statute by implication is not favored," but concluded—insofar as the scope of judicial review is concerned—"the legislative intent to repeal the scope of review provisions of Section 42-17-60 is explicitly implied from the provisions of the later general [APA] and [the APA's] legislative history." Id. Accordingly, the Lark Court stopped well short of adopting the particular controlling view of the APA now endorsed by the Petitioner, and the Lark Court also reiterated the paramount importance of determining the intent of the legislature when interpreting its statutes. Id.

In the remaining cases cited by the Petitioner as standing for the proposition that

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("Rule 59(e) is not applicable in proceedings before the commission.").

when the APA and the Workers' Compensation Act conflict, the APA controls, it is notable that each case only addresses a specific aspect of conflict and that conflict was always **after** judicial review of an agency's decision was sought. See Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012) (appealability of an order); Pringle v. Builders Transp., 298 S.C. 494, 381 S.E.2d 731 (1989) (contents of the notice of appeal).

The Petitioner points to language in the APA referencing a request for rehearing—specifically, language in S.C. Code Ann. § 1-23-380(1)[8]—and argues that the APA necessarily authorizes a petition for rehearing to the Commission following a decision by the Appellant Panel. (Br. p. 5.) Again, for this to be correct, the APA must not only—as the Petitioner contends—"govern[] the process of appealing an agency's decision to an appellate court,"[9] but the process for review **within** the agency and, in this instance, it must do so even where the legislature has provided a specific statutory procedure for Commission review in the Workers' Compensation Act. See §§ 42-15-50 and -60.

In this regard, the Petitioner's position violates the general rule of statutory construction is that a specific statute prevails over a more general one, Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994), as well as the rule that the words of a statute are the best evidence of its meaning. City of Rock Hill v. Harris, 391 S.C. 149, 155, 705 S.E.2d 53, 55 (2011). After all, Title 1 of the South Carolina Code of Laws applies to

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[7] 276 S.C. at 135, 276 S.E.2d at 306.
[8] In pertinent part, § 1-23-380(1) provides that "[p]roceedings for [judicial] review [upon exhaustion of administrative remedies available within an agency] are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, **if a rehearing is requested**, within thirty days after the decision is rendered." (emphasis added).
[9] (Br. p. 5.)

administrative agencies in general. Section 1-23-380(1) does not provide independent authority for the Commission to rehear a case already decided by the Appellate Panel. It merely describes the procedure for **judicial** review upon the exhaustion of administrative remedies availability within an agency. It does not provide authority for further **administrative** review, i.e., it does not override other acts by the legislature specifically addressing the availability of administrative remedies **within** any agency—which remedy under § 42-17-50 is expressly deemed "conclusive" by § 42-17-60. The Petitioner's reliance on the APA to support his petition for rehearing by the Commission after the Appellant Panel's decision is improper because § 1-23-380(1) does not provide any agency authority to rehear a matter—and, in any event, does not provide the Commission such authority in the face of §§ 42-17-50 and -60—but merely advises how to institute proceedings for judicial review from administrative agencies that do not allow rehearings and for those that do allow rehearings.[10] Under the Workers' Compensation Act, the Appellate Panel hearing is the rehearing allowed in proceedings before the Commission—as set forth in § 42-17-50—and it is "conclusive,"[11] and its conclusive nature is not upset or otherwise altered by § 1-23-380(1).

This leads naturally into the Court of Appeals' correct distinction of McCummings v. South Carolina Department of Corrections, 319 S.C. 440, 462 S.E.2d 271 (1995) from the present situation. As the Court of Appeals rightfully observed,

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[10] Section 1-23-380, titled "Judicial review **upon exhaustion** of administrative remedies," plainly states that "[a] party **who has exhausted all administrative remedies available within the agency** and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1." (emphasis added). Nowhere does this statute state how the contested cases should be handled when it is before the agency, that is, before the administrative remedies are exhausted.

[11] § 42-17-60.

McCummings was not in the context of workers' compensation but involved an employment grievance. The "comprehensive" nature of the Workers' Compensation Act with respect to workers' compensation awards is well-recognized. Parker v. Williams and Madjanik, Inc., 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980) ("The South Carolina Workmen's Compensation Law, s 42-1-10, et seq., created a comprehensive approach to provide compensation for employees injured by accidents arising out of and in the course of their employment.") Here, again, the Workers' Compensation Act contains statutes directly applicable to the "Awards Procedure" in the Commission (*see generally* Chapter 17 of Title 42 of the South Carolina Code of Laws), particularly § 42-17-50 (addressing "Review and rehearing by Commission") and § 42-17-60 (addressing "Conclusiveness of award; appeals; payment of compensation during appeal; accrual of interest"). The general reference to a request for rehearing in the general statute § 1-23-380(1) does not provide sufficient evidence to alter the specific legislative directives concerning the "Awards Procedure" before the Commission to allow for a (second) rehearing by the Commission after a decision by the Appellate Panel.

B. The Petitioner's citation to *In re Crawford* as authority for the Commission to grant rehearing is unavailing.[12]

The Petitioner cites In re Crawford, 205 S.C. 72, 93-94, 30 S.E.2d 841, 849-50 (1944), contending that the concurrence "reasons that until a party files an appeal, the commission can exercise all powers that are 'incident to [its] jurisdiction,' including rehearing decisions." (Br. p. 9.) As an initial matter, while the Petitioner notes that

[12] This section of the Brief of Respondent corresponds to Arguments I.2 and I.3 of the Brief of Petitioner.

Justice Stukes's concurring opinion in Crawford was joined by a majority of the Court, the Petitioner does not note or otherwise explain the fact that Chief Justice Baker's "main opinion" was also joined by all members of the Court (but Justice Stukes) without any apparent reservation or qualification. Whereas the Stukes concurrence did decide the issue of "whether the [Workers' Compensation] Commission may grant and hold a rehearing of a former decision and award by it . . . ,"[13] Chief Justice Baker's opinion expressly declined to do so. Id., 30 S.E.2d at 844 ("Without, however, deciding this issue, and without passing upon the question whether there is any implied power in the South Carolina [Workers' Compensation] Commission to grant a rehearing and to reverse an award of the full Commission on the testimony taken at such hearing . . . .") Accordingly, it is not entirely clear to the undersigned that Justice Stukes's concurrence expresses the holding of the Court on this issue.

Assuming, *arguendo*, that Justice Stukes's concurrence does express the holding of the Court on the issue of implied power of the Commission to grant rehearing, such holding is not consistent with the blanket proposition recited in the Petitioner's brief, but is limited to a circumstance not now presented to the Court: that involving newly-discovered evidence. Justice Stukes expressly cited the Supreme Court of North Carolina's decision in Butts v. Montague Bros., 208 N.C. 186, 179 S.E. 799, 801, explaining his holding thusly:

> Finding no express authorization in their law [(i.e., North Carolina law)] for a rehearing of an otherwise final adjudication by the Commission, just as there is no express provision therefor in our subsequent and similar law, the Court found analogy in the terms of their law corresponding (apparently exactly) to sec. 46 of our

[13] 205 S.C. at ___, 30 S.E.2d at 849.

> original Act (now sec. 7035-49 of the Code of 1942), and very clearly and pointedly held that such power exists in the Commission, saying: "All the provisions of the act show that it was the purpose of the General Assembly that the Industrial Commission should have a continuing jurisdiction of all proceedings begun before the commission for compensation in accordance with its terms. The superior court has jurisdiction only when a party to a proceeding has appealed to said court on matters of law involved therein. Findings of fact made by the commission are conclusive, and, when supported by evidence, cannot be reviewed by the superior court. **We think it clear that the commission has the power, in a proper case, and in accordance with its rules and regulations, to grant a rehearing of a proceeding pending before it, and in which it has made an award, <u>on the ground of newly discovered evidence</u>.**"
>
> **With the foregoing I agree** and further think that it should be so held in this case for it is important that the Industrial Commission and our citizens and others coming within its jurisdiction know the rules of procedure which govern it and them in all proceedings upon the filing and adjudication of claims under the Compensation Law.

<u>Crawford</u>, 205 S.C. at ___, 30 S.E.2d at 850 (emphasis added).

Lastly, the Petitioner contends that <u>Crawford</u> "has never been overruled." (Br. p. 9.) The Petitioner's interpretation of <u>Crawford</u> would appear to be undermined by this Court's recent decision in <u>Pikaart</u>, 393 S.C. at 324, 713 S.E.2d at 274, n. 4, which, as noted above, favorably cited the <u>Nettles</u> decision for the proposition that "**workers' compensation law <u>does not contain a motion to reconsider</u>**; rather, **a party <u>must</u> appeal.**" (emphasis added).

In this regard, and, to be sure, respectfully, the Respondent notes that the Petitioner's argument about the applicability—or lack thereof—of the South Carolina Rules of Civil Procedure, particularly, Rule 59, SCRCP, to the Commission, is a red herring. Under South Carolina law, motions are to be treated according to their substance

and effect. Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its substance and effect as opposed to how it was captioned by party); Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (illustrating that when the court is able to discern the relief requested, "[i]t is the substance of the requested relief that matters regardless of the form in which the request for relief was framed"). The point that the Court of Appeals was making by observing case law that Rule 59(e) motions are not applicable in matters before the Commission was not confined to the narrow view of whether the particular device of Rule 59(e) was available in matter before the Commission, but whether, in substance, a request to the Commission was allowed that was similar to a Rule 59(e) motion. This is, again, consistent with this Court's favorable citation to Nettles in Pikaart that "**workers' compensation law does not contain a motion to reconsider**; rather, **a party must appeal**." 393 S.C. at 324, 713 S.E.2d at 274, n. 4 (emphasis added).

II. THIS COURT NEED NOT CERTIFY THIS CASE TO EXPLAIN HOW THE 2007 AMENDMENTS TO THE WORKERS' COMPENSATION ACT WILL APPLY TO AN INJURY THAT STRADDLES THE EFFECTIVE DATE OF THOSE AMENDMENTS BECAUSE THE MATTER IS NOT PRESERVED FOR REVIEW AND THE CLAIMANT WAITED MORE THAN TWO YEARS AFTER THE AMENDMENT WAS IN EFFECT BEFORE BRINGING HIS CLAIM.

The second question presented by the Petitioner was not specifically set forth in the Petition for a Writ of Certiorari but instead was implicitly implied in the arguments. (Pet. p. 1.) The Respondent asserts that this question is not before this Court at this time. If this Court reverses the Court of Appeals' decision, the case should be remanded to the Court of Appeals for a decision on the merits.

Solely out of an abundance of caution and without waiving its argument that this question is not before the Court, the Respondent addresses this question because it was raised in the Brief of the Petitioner.

A. This case does not present a lingering question as to the applicability of the new law because the new law is the law of the case and any question as to the application of the new law is not preserved for appellate review.

In 2007, the legislature substantially revised the Workers' Compensation Law. These revisions included adding an entirely new Code section, S.C. Code Ann. § 41-1-172, to establish when a repetitive trauma injury may be compensable and substantially revising S.C. Code Ann. § 42-15-40 to specifically set forth when the right to compensation for a repetitive trauma injury is barred. 2007 Act No. 111, Part I, §§ 7 & 26. These revisions apply "to injuries that occur on or after" July 1, 2007. Id. at Part IV, § 2.

The record is clear that the Petitioner did not in any way contend that the pre-July 1, 2007 workers' compensation law ("old law") was applicable to this case until he raised the issue for the first time in his petition for rehearing following the Appellate Panel's decision. (App. pp. 165-67.) Indeed, the Petitioner argued to the Single Commissioner that the date of his injury was May 4, 2009 and that his injury was compensable under § 42-1-172, **which statute did not exist under the old law**. (App. pp. 133 and 136, p. 206, line 15 – p. 208, line 16, p. 221, lines 11-13.) The Single Commissioner found "the [Petitioner] suffered a compensable repetitive trauma injury on or about May 5, 2009" and applied § 42-1-172. (App. pp. 113-14, ¶ 4 and p. 115, ¶ 4.) The Petitioner did **not** appeal or otherwise question the application of the uniquely new-law statute, § 42-1-172. Moreover, the Petitioner failed to argue that the date of injury was before July 1, 2007 or

that the old-law statute used to determine compensability for repetitive trauma injuries, S.C. Code Ann. § 42-1-160, applied when challenging the Respondent's request for the Commission's review. (*See* App. pp. 154-63, p. 249, line 5 – p. 256, line 13.) The Petitioner admits this argument was not raised until his petition for rehearing to the Commission. (Br. p. 14.) Consequently, the new law is the law of the case and/or any question as to its application is not preserved for review. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance."); Brunson v. Am. Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct. App. 2005) ("'The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant's exception to the full commission . . . .' 'Only issues within the application for review under S.C. Code Ann. § 42-17-50 (1976) are preserved for appeal to the commission.") (internal case-law citation omitted). The Petitioner conceded to the Commission that he was seeking compensation under the new law, which precludes him from arguing on appeal that the old law applies. (App. p. 206, line 15 – p. 208, line 16, p. 249, line 5 – p. 256, line 13.); see TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.")

Indeed, even if a petition for rehearing to the Commission following the Appellate Panel's decision is found by the Court to be allowed, "a party may not raise an issue for the first time in a petition for rehearing." Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2010).

B. This case does not present a lingering question as to the applicability of the new law because the Claimant waited more than two years after the

<u>amendment was in effect before bringing his claim</u>.

Similarly, there is no lingering issue as to whether the old law or the new law applies. It is already established for the purposes of this case that the new law applies and the old law does not. On remand, the Court of Appeals would need only to determine whether there is substantial evidence to support the Appellate Panel's decision that, under the new law, the Petitioner's claim for benefits should be denied as untimely.

On July 1, 2007, the Petitioner was both aware of a repetitive trauma injury to his back related to his job and of the existence of the Workers' Compensation system. Nonetheless, he waited more than two years to bring a claim for this injury. The facts do not present a novel issue that requires certification by this Court. Instead, due to the Petitioner's delay in waiting to file his claim until September 29, 2009[14], more than two years after July 1, 2007, the fact that the Petitioner knew of his injury prior to the statute's effective date is moot. On July 1, 2007, the Petitioner knew of his injury and had two years to bring his claim. He failed to do so, and the Appellate Panel properly denied his claim.

a. The facts founds by the Commission are supported by substantial evidence in the record.

(1) The Petitioner was aware that he had a back injury related to his job with Charleston County School District since 1994 or 1995.[15]

The Commission never found that the Petitioner's first experience of back pain was in 1994 or 1995 and that this was the point when he knew or should have known that he had a compensable injury. Instead, the Commission found:

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[14] (App. p. 133.)
[15] (App. p. 129, ¶ 2.)

> 2. That the claimant **was aware that he had a back injury related to his job with Charleston County School District since 1994 or 1995.**
>
> 3. That the claimant **continued to receive pain medications, injections, and physical therapy** from various physicians related to his work injury **since 1994 or 1995.**
>
> 4. That the claimant **missed days from work on and off from 1994 and 1995** due to ongoing pain in his back.

(App. p. 129, ¶¶ 2-4 (emphasis added).) These findings are supported by the Petitioner's own testimony at his deposition and at the hearing before the Single Commissioner and by his medical records. The Petitioner testified that since the mid-1990s he knew that his back was hurting and his job was causing it. (App. p. 183; p. 187, line 25 – p. 188, line 4; p. 191, line 3 – p. 192, line 13; p. 193, line 3-22; p. 194, lines 5-16; p. 211, line 23 – p. 212, line 20; p. 222, lines 3-24; p. 231, lines 17-20; p. 236, lines 5-8.) The Petitioner testified that he went out of work for his back in the mid-1990s and saw his own doctor, Dr. T. Pappas, over the years for this problem. (App. p. 236, line 5 – p. 237, line 5; p. 200, lines 19-22; p. 201, line 20 – p. 202, line 4; *see* App. p. 281; Supp. App. pp. 8-9.) He testified that he knew his back pain was related to work. (App. p. 243, line 17 – p. 244, line 19.)

The Petitioner testified that he went to a chiropractor in 2001 and to a physical therapist in 2002 for problems with back pain. (App. p. 237, line 55 – p. 238, line 1; *see* App. pp. 275-277, 283-288; Supp. App. pp. 1-9.) Records from his physical therapist, Trident Medical Center, indicate that in 2002 he attributed his back pain to his job. (App. p. 283 (indicating condition related to employment, accident date of January 1, 1999, "hurt back on job," signed by the Petitioner on September 19, 2002); *see* App. pp. 284-

288.) The Petitioner testified that he received shots in his back in 2006. (App. p. 196, lines 6-20.)

In January 2009, the Petitioner went to Dr. John Johnson with the Southeastern Spine Institute because he "couldn't put it off no longer." (App. p. 201, line 1 – p. 202, line 4; *see* App. pp. 259-260 (indicating back pain since at least 2006 when he injured his neck); *see also* App. p. 191, line 3 – p. 192, line 13; p. 195, lines 2-8.) In April and May 2009, the Petitioner reported to Dr. Jeffrey Buncher that he had pain in his lower back which had lasted for years. (App. pp. 266-267, 274.)

The Petitioner admitted to the Single Commissioner that Tracy Kessler, the Respondent's representative, probably wrote down what he told her regarding his repetitive trauma back injury. (App. p. 204; p. 241, line 2 – p. 242, line 6; *see* App. pp. 295-298 (Respondent's records of the Petitioner's report in 2009) (noting "[h]e stated that he was told two years ago that he had a work related issue with his lower back and felt that it wasn't that bad so **he chose not to pursue it** at that time" and noting the Petitioner alleged that lifting equipment over the years at work caused his low back pain) (emphasis added).) The Petitioner also admitted in his deposition to telling the claims specialist that he had low back pain since 1994 or 1995. (App. p. 191, line 23 – p. 192, line 13; *see* App. p. 273.)

Substantial evidence in the record supports the Commission's findings that the Petitioner was aware of a job-related repetitive trauma back injury since 1994 or 1995, that he received treatment for this repetitive trauma injury, and that he missed work off and on for this repetitive trauma injury. Anderson, 343 S.C. at 492, 541 S.E.2d at 528; Shealy, 341 S.C. at 455, 535 S.E.2d at 442 ("The final determination of witness

credibility and the weight to be accorded evidence is reserved to the [Appellate Panel].") (internal citation omitted); see Murphy v. Owens Corning, 393 S.C. 77, 82-83, 710 S.E.2d 454, 456-57 (Ct. App. 2011 (deferring to the Commission as the fact finder regarding when the claimant knew or should have known her repetitive trauma injury was work related).

(2) The Petitioner was aware of the existence of a Workers' Compensation system by no later than 2006.[16]

The Petitioner argued, for the first time to the Court of Appeals, that the Commission erred in finding that the Petitioner "was aware of the existence of a Workers' Compensation system by no later than 2006" because he "attempted to bring a Workers' Compensation claim in relation to a specific injury to his neck in 2006." (App. pp. 30-35; *see* App. p. 129, ¶¶ 7-8.) The Petitioner set forth an estoppel argument which was never raised to the Single Commissioner (in the pleadings, briefs, or oral arguments),[17] to the Appellate Panel (in the briefs or oral arguments),[18] or included in either orders by the Commission.[19] The Petitioner did not even raise this argument in his Petition for Rehearing,[20] which the Court of Appeals properly concluded did not stay the time to file a notice of appeal.

This estoppel argument, and the facts which the Petitioner contends support this argument, were never raised to or ruled upon by the Commission. Wilder Corp. v. Wilke, 300 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be

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[16] (App. p. 129, ¶ 8.)
[17] (App. p. 133; 136; 203-245.)
[18] (App. pp. 154-163; p. 249, lines 8-10 ("Although Appellants raised multiple issues in their Form 30, I chose to just address one, the statute of limitations argument."), p. 249, line 5 – p. 256, line 13.)
[19] (App. pp. 107-116; 117-131.)

raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Transp. Ins. Co. v. Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010); see Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) ("an unchallenged ruling, 'right or wrong, is the law of [the] case and requires affirmance'") (*quoting* Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Assuming, *arguendo*, that the Petitioner's estoppel argument was properly before this Court, substantial evidence in the record supports the Commission's finding that "the [Petitioner] was not coerced into waiting to file a claim and was not told he would be laid off if he brought a claim or that his claim would be taken care of." (App. p. 130, ¶ 9; *see* App. p. 216, lines 1-11; p. 238, lines 3-16; p. 197, line 21 – p. 198, line 10 (denying being told that he would be laid off for filing a workers' compensation claim).)

The Petitioner testified that he waited until 2009 to bring his repetitive trauma back injury claim because he wanted "to keep a low profile." (App. p. 197, line 21 – p. 198, line 3.) He also testified that he did not report this injury in 1994 or 1995 because his wife was fighting cancer and he feared being laid off. (App. p. 216, lines 1-11.)

The Petitioner readily admitted that he attempted to bring a Workers' Compensation claim in relation to a specific injury to his neck in 2006. (App. p. 129, ¶ 7; p. 213, line 18 – p. 214, line 17; p. 238, line 19 – p. 239, line 7; *see* App. p. 280 (July 12, 2006 doctor's note regarding neck and shoulder pain indicating that the Petitioner "was

[20] (App. pp. 164-170.)

seen at Doctors Care **(because of workers comp)**" (emphasis added); *see also* App. p. 194, line 17 – p. 195, line 19.) When asked "back in 2006 when you had surgery on your neck, why didn't you ask for workers' comp for that back then?," the Petitioner responded, " I did." (App. p. 198, lines 7-10.) Substantial evidence also supports the Commission's finding that the Petitioner was aware of the existence of a Workers' Compensation system by no later than 2006. Shealy, 341 S.C. at 455, 535 S.E.2d at 442 ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel].") (internal citation omitted).

The Petitioner was not like the employee in Altman v. Williams Furniture Co who relied on her employer's company doctor, who misled the employee regarding certain medical findings. 250 S.C. 98, 100, 156 S.E.2d 433, 434 (1967). The Petitioner chose to go to his own doctors (Dr. John Goeldi[21], Dr. Jeffrey Buncher[22], Dr. T. Pappas[23], and Trident Medical Center[24]) in addition to the Respondent directing him to Doctors Care.[25] Similarly, the Petitioner is not like the widow in Robertson v. Brissey's Garage, Inc., 270 S.C. 58, 240 S.E.2d 810 (1978), because the Commission found that "the [Petitioner] was not coerced into waiting to file a claim and was not told he would be laid off if he brought a claim or that his claim would be taken care of." (R. p. 130, ¶ 9.) This finding is supported by substantial evidence in the record and must be affirmed.

Substantial evidence in the record supports the Commission's findings that the Petitioner was aware of a work related repetitive trauma injury to his back as early as

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[21] (App. pp. 268-271, 275-277; Supp. App. pp. 1-7.)
[22] (App. pp. 266-267, 274.)
[23] (App. pp. 278-282; Supp. App. pp. 8-10.)
[24] (App. pp. 283-288.)
[25] (App. p. 272.)

1994 or 1995, was aware of the existence of the Workers' Compensation system by 2006 (when he tried to bring a claim for another injury), was not coerced into not bringing a Workers' Compensation claim, was not told he would be laid off if he brought a Workers' Compensation claim, and was never told that his Workers' Compensation claim would be taken care of outside of the Workers' Compensation system. All of the Commission's findings of facts should be affirmed as they are supported by substantial evidence and/or are the law of the case. Anderson, 343 S.C. at 492, 541 S.E.2d at 528; Shealy, 341 S.C. at 455, 535 S.E.2d at 442; Charleston Lumber Co., 338 S.C. at 175, 525 S.E.2d at 871.

b. The Commission applied the correct version of the Workers' Compensation Act.

The Petitioner argued to the Court of Appeals that the statute of limitations set forth in S.C. Code Ann. § 42-15-40 should not be applied to the present repetitive trauma injury claim. He also argued that even if the current statute of limitations was controlling then his claim would not be barred if the statute was "properly applied." Both assertions are incorrect.

(1) The history of the statute of limitations as applied to repetitive trauma injury claims.

In 2007, the legislature greatly revised the Act. These revisions included adding § 42-1-172 to establish when a repetitive trauma injury may be compensable and revising § 42-15-40 to specifically set forth when the right to compensation for a repetitive trauma injury is barred. 2007 Act No. 111, Part I, §§ 7 & 26. These revisions apply "to injuries that occur on or after" July 1, 2007. Id., Part IV, § 2.

Prior the 2007 revisions, compensability for repetitive trauma injuries was determined under S.C. Code Ann. § 42-1-160 (Supp. 2001), "'Injury' and 'personal injury' defined." See Pee v. AVM, Inc., 352 S.C. 167, 174, 573 S.E.2d 785, 789 (2002) (finding a repetitive trauma injury meets the definition of injury by accident). On the same day that Pee was decided, this Court also addressed how to apply the statute of limitations of the Workers' Compensation Act, S.C. Code Ann. § 42-15-40 (Supp. 2001), to a repetitive trauma injury in Schurlknight v. City of N. Charleston, 352 S.C. 175, 179, 574 S.E.2d 194, 196 (2002).

Prior to Schurlknight, this Court held the discovery rule as it relates to the statute of limitations also applied to Workers' Compensation actions. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 21-22, 416 S.E.2d 639, 641 (1992) (concluding that the Claimant's discovery of a compensable knee injury was the date when it was discovered that her knee problem resulted from a previous work accident). The Schurlknight Court, however, rejected the application of the discovery rule—that the two-year time period of the § 42-15-40 began to run when the claimant knew or should have known he had a compensable injury—for repetitive trauma injuries and instead looked to how other jurisdictions addressed the statute of limitations for repetitive trauma injuries. Id. at 177-78, 574 S.E.2d at 195. After concluding that using the "last day of exposure" as the date from when the statute of limitations begins to run was consistent with the Court's liberal construction of the Workers' Compensation Act and provided "the added advantage of fixing an outside date for filing that avoids the need to litigate the date of injury," the Schurlknight Court held that the "last day of exposure" rule applied to repetitive trauma injury claims. Id. at 178-79, 574 S.E.2d at 195-96.

In 2007 Act No. 111, the legislature specifically rejected the "last day of exposure" rule for repetitive trauma injury claims and added the following language to § 42-15-40:

> For a "repetitive trauma injury" as defined in Section 42-1-172, the right to compensation is barred unless a claim is filed with the commission **within two years after the employee knew or should have known that his injury is compensable** but no more than seven years after the last date of injurious exposure. **This section applies regardless of whether the employee was aware that his repetitive trauma injury was the result of his employment**. . . .

S.C. Code Ann. § 42-15-40 (Supp. 2009) (emphasis added). "The legislature is presumed to be aware of [the] Court's interpretation of its statutes." State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000) (*citing* Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 778 (1997) ("[T]here is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.")).

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." Wigfall v. Tidelands Utilities, Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003) (noting "when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities"). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

The legislature's 2007 revision to § 42-15-40 to include the plain language of the discovery rule—that a repetitive trauma injury claim is barred unless filed "within two years after the employee **knew or should have known** that his injury is compensable"—is clear and manifestly reflects the legislature's intent to expressly apply the discovery rule to repetitive trauma injury claims. See Henry-Davenport v. School Dist. of Fairfield County, 705 S.E.2d 26, 27-28, 391 S.C. 85, 86-89 (2011) (holding the legislature, in enacting S.C. Code Ann. § 59-54-15 in 1998, overruled the Court's prior decision on the same issue).

The plain and unambiguous language of § 42-15-40 must be applied. "If a statute's language is plain, unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Id. at 28, 391 S.C. at 88 (*quoting* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000). "For a 'repetitive trauma injury' . . ., the right to compensation is barred unless a claim is filed with the commission within two years after the employee knew or should have known that his injury is compensable . . . ." § 42-15-40.

(2) The Petitioner failed to argue that the pre-July 1, 2007 law applied and cannot do so on appeal.

The Petitioner raised for the first time on appeal that the Workers' Compensation Act as written prior to July 1, 2007 applied to his case. (*See* App. pp. 165-167; 36; 44-46.) "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Transp. Ins. Co., 389 S.C. at 431, 699 S.E.2d at 691; see Charleston Lumber Co., 338 S.C. at 175, 525 S.E.2d at 871 see also Herron, 395 S.C.

at 469, 719 S.E.2d at 644 ("a party may not raise an issue for the first time in a petition for rehearing").

The Petitioner argued to the Single Commissioner that the date of his injury was May 4, 2009 and that his injury was compensable under § 42-1-172, which did not exist prior to the 2007 revision of the Workers' Compensation Act. (App. p. 133; p. 136; p. 206, line 15 – p. 208, line 16; p. 221, lines 11-13.) The Single Commissioner found "the [Petitioner] suffered a compensable repetitive trauma injury on or about May 5, 2009" and applied § 42-1-172. (App. pp. 113-114, ¶ 4 & p. 115, ¶ 4.) The Petitioner did not appeal this finding of a May 5, 2009 date of accident or the application of § 42-1-172, the post-July 1, 2007 statute used to determine compensability for repetitive trauma injuries. This "unchallenged ruling, 'right or wrong, is the law of [the] case and requires affirmance.'" Charleston Lumber Co., 338 S.C. at 175, 525 S.E.2d at 871 (*quoting* Buckner, 255 S.C. at 161, 177 S.E.2d at 544); see also TNS Mills, Inc., 331 S.C. at 617, 503 S.E.2d at 474 ("An issue conceded in a lower court may not be argued on appeal.").

The Petitioner further failed to argue that the date of injury was before July 1, 2007 or that the pre-July 1, 2007 statute used to determine compensability for repetitive trauma injuries, § 42-1-160 applied when challenging the Respondent's request for the Commission's review. (*See* App. p. 154-163; p. 249, line 5 – p. 256, line 13.)

The application of § 42-1-172, the post-July 1, 2007 statute used to determine compensability for repetitive trauma injuries, is the law of the case and requires affirmation. Charleston Lumber Co., 338 S.C. at 175, 525 S.E.2d at 871.

(3) The Commission properly applied the post-July 1, 2007 law.

The Commission correctly applied the law argued by the Petitioner to the facts which he presented. That is, the Commission applied the post-July 1, 2007 law regarding repetitive trauma injuries (§ 42-1-172 and § 42-15-40 (as amended)) to the Petitioner's facts.[26]

As set forth more fully above, substantial evidence in the record supports the Commission's finding that the Petitioner was aware of a work related repetitive trauma injury to his back as early as 1994 or 1995 and was aware of the existence of the Workers' Compensation system by 2006 (when he tried to bring a claim for another injury). As such, it is only logical to conclude that on July 1, 2007 the Petitioner was both aware of a repetitive trauma injury to his back related to his job and was aware of the existence of the Workers' Compensation system. The Petitioner did not file a claim for his repetitive trauma back injury until **September 29, 2009**[27]—more than two years after (1) he knew his repetitive trauma injury was related to his job, (2) knew of the existence of the Workers' Compensation system, and (3) the Workers' Compensation Act was revised to specifically adopt the discovery rule for repetitive trauma injuries. Under the plain language of § 42-15-40 and the facts of the case, the Commission properly concluded that the Petitioner's claim for benefits should be denied for failure to timely file a claim.

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[26] The most significant of the facts being that the Petitioner's work related repetitive trauma injury began in 1994 or 1995, that he was aware of the Workers' Compensation system by no later than 2006, and that he filed the present claim on September 29, 2009. (App. pp. 129-130, ¶¶ 2 & 8; App. p. 133.)

[27] (App. p. 133.)

The Petitioner's assertions to the Court of Appeals that the Commission "does not appreciate or account for the more complicated scenarios" associated with repetitive trauma injuries or that the revisions made to the Workers' Compensation Act in 2007 "evaporated" or "eviscerated" the Claimant's repetitive trauma injury claim are nothing more than red herrings. (*See* App., pp. 41-42 & 45-46.) As discussed above, the legislature overruled Schurlknight's "last day of exposure" rule and its supposed advantages of preventing the litigation of the date of injury and of not prejudicing an employee who discovers symptoms to a repetitive trauma injury but continues to work by adopting § 42-1-172 and including the language of the discovery rule in § 42-15-40. See Schurlknight, 352 S.C. at 178, 574 S.E.2d at 195.

The Commission applied the plain and unambiguous language of § 42-15-40. If the Petitioner contends that this interpretation does not appreciate or account for the more complicated scenarios associated with repetitive trauma injuries or prejudices an employee who discovers symptoms to a repetitive trauma injury but continues to work, then those are matters to be taken up with the legislature—not with this Court. Such arguments are public policy arguments and not assertions of an error in the application of the law, in addition to not being properly before this Court on the subject Petition. Such policy arguments are matters for the legislature and are not the province of the courts. Wigfall, 354 S.C. at 116, 580 S.E.2d at 109 ("[S]ources of inequities are the province of the Legislature to correct by balancing the interests, risks and rewards of such a large, comprehensive program" as South Carolina's Workers' Compensation laws.) "It is not the province of this Court to perform legislative functions." Id. at 117, 580 S.E.2d at 108

(*quoting* Spoone v. Newsome Chevrolet Buick, 306 S.C. 438, 440, 412 S.E.2d 434, 434-35 (Ct. App. 1991), *aff'd* 309 S.C. 432, 424 S.E.2d 489 (1992).

Furthermore, it was not the revisions made to the Workers' Compensation Act in 2007 that "evaporated" or "eviscerated" the Petitioner's repetitive trauma injury claim but the Petitioner's own delay that barred his right to benefits for his repetitive trauma back injury. The Petitioner waited more than three years after he was aware both of a repetitive trauma injury to his back related to his job and of the existence of the Workers' Compensation system and waited more than two years after § 42-15-40 was revised to adopt the discovery rule for repetitive trauma injury to file his claim for his injury.

As admitted by the Petitioner, his repetitive trauma injury began before July 1, 2007 and continued after July 1, 2007. (App. pp. 45, 46 n.8.) Under the plain and unambiguous reading of § 42-15-40, the Petitioner's right to compensation for his repetitive trauma back injury must be barred because his claim was not "filed with the commission within two years after the employee knew or should have known that his injury is compensable." Under the Petitioner's admitted facts, his claim was barred on July 1, 2009, which was more than two years after he knew or should have known that he had a compensable repetitive trauma injury. Clearly, the claim filed on September 29, 2009 was properly barred pursuant to § 42-15-40.

If this Court overrules the Court of Appeals' dismissal and decides to address this case on its merits, the Commission's decision and order must be affirmed because it is not affected by an error of law and substantial evidence supports the factual findings. Shealy, 341 S.C. at 454, 535 S.E.2d at 442; Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

CONCLUSION

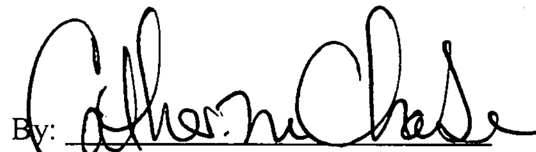
For the foregoing reasons, and any other reason that may be evident from the record, the Court of Appeals' decision dismissed the Petitioner's appeal should be affirmed. Alternatively, in the event the Court of Appeals' decision is reversed, this matter should be remanded to the Court of Appeals for that court's consideration of the issues.

Further in the alternative, in the event the Court of Appeals' decision is reversed and this Court does not remand this case to the Court of Appeals to be heard on the merits, this Court should affirm the decision and order of the Commission. The Commission's decision and order is not affected by any error of law. The Commission properly determined that the Claimant's recovery for his repetitive trauma injury was barred by the statute of limitations. Further, the decision and order is supported by substantial evidence in the record.

[Signature on following page.]

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP



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Charleston, South Carolina

Dated: August 8, 2014

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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the South Carolina Workers' Compensation Commission

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Opinion No. 5020 (S.C. Ct. App. filed August 8, 2012)

Ricky Rhame,

Petitioner,

v.

Charleston County School District,

Respondent,

PROOF OF SERVICE

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I, Catherine H. Chase, of Young Clement Rivers, LLP, do hereby certify that a copy of the Respondent's **Brief of Respondent** in the above-captioned matter was served on the Petitioner by depositing a copy of the same in the United States Mail, postage prepaid, on August 8, 2014, addressed as follows to his attorneys of record:

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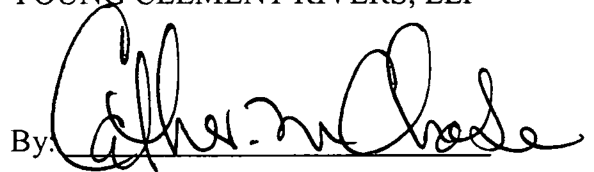

By: ______________________

Charleston, South Carolina
Dated: August 8, 2014