THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
T. Scott Beck, Commissioner

W.C.C. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee,.....Appellant,

v.

SC Department of Natural Resources, Employer, and
South Carolina State Accident Fund, Carrier.....Respondents.

INITIAL BRIEF OF THE RESPONDENTS

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Questions Presented

I. Does the Appellant wrongly assert that the Respondents admitted "liability" for benefits under the Workers' Compensation Act?

II. Does the Appellant incorrectly cast S.C. Code Ann. § 42-9-35 as an "affirmative defense," as opposed to a mandatory, statutory pre-requisite to

compensation benefits?

III. Is the Commission's conclusion that the Appellant failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 the law of the case?

IV. Is the Appellant's argument regarding the propriety of the Hearing Commissioner's award, which was vacated by the Commission's Appellate Panel, properly before the Court on appeal?

Statement of the Case

By his Form 50 dated November 17, 2014, the Appellant, Chisholm Frampton, alleges that on September 4, 2010, he was driving a truck across a dove field and injured his neck and right arm. (Claimant's Form 50). The Respondents, the South Carolina Department of Natural Resources and the State Accident Fund, by Form 51 dated December 4, 2014, admitted the alleged accident, but specifically denied the "extent of injury" and further denied that the Appellant was entitled to any medical or compensation benefits as a result. Contrary to the Appellant's allegations, the Respondents did not, at any time, admit "liability" for workers' compensation benefits.

Instead, the Respondents consistently argued that the alleged events of September 4, 2010 caused nothing more than a cervical sprain or strain injury that quickly resolved. The Respondents further argued that the Appellant did not aggravate any of his known pre-existing conditions, which include a C6-7 radiculopathy diagnosed approximately six months earlier. In addition, the Respondents argued that the Appellant reinjured his neck in a subsequent intervening accident on November 4, 2010, after which he required a cervical fusion surgery that was covered under the State Health Plan. The Respondent later reinjured his neck in yet another subsequent, intervening motor vehicle accident on May 16, 2011. Therefore, the Respondents argued that any permanent loss of us of the neck (back), as well as any need for medical treatment, is not causally-related to the dove field incident of September 4, 2010 and is not the responsibility of the Respondents.

The claim originally came before Hearing Commissioner Taylor on July 15, 2017, pursuant to the Forms 50 and 51. In her October 3, 2016 Decision and Order, the Hearing Commissioner awarded the Appellant benefits for a 20% loss of use of the back, despite finding that the "Claimant suffered from pre-existing neck pain and right arm numbness" and that

> "there is no medical evidence stated to a reasonable degree of medical certainty that the Claimant's September 4, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon."

Commissioner Taylor also concluded that the "Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35." Neither these findings, nor this conclusion, were appealed by the Appellant and are; therefore, the law of the case.

In fact, the sole issue raised on the Appellant's October 17, 2016 Form 30, Request for Commission Review, is

> "The Single Commissioner erred in regard to the finding that the injured worker only lost 20% of the spine inasmuch as the finding is not consistent with the substantial evidence in the record, which indicates a greater percentage of loss of use of the spine or a finding of permanent and total disability pursuant to §42-9-30."

Neither the Appellant's Form 30, nor his brief to the Commission's Appellate Panel, make any reference to his statutory burden of proof under S.C. Code Ann. § 42-9-35, or to the Hearing Commissioner's finding and conclusion that he had failed to meet that statutory burden.

The Respondents filed a cross-appeal by Form 30 dated October 17, 2016, arguing, *inter alia*,

> "Did the Hearing Commissioner err as a matter of law in awarding medical and compensation benefits to the Claimant after finding and concluding that the Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35?"

The sum total of the Appellant's response to this argument, contained in his Brief to the Appellate Panel, is as follows:

> "This is an admitted claim accepted by the Director of the State Accident Fund, Mr. Harry Gregory. The argument of the Defendants comes too late inasmuch as the Defendants have accepted the claim and now the question is should additional benefits be paid to the injured Worker [sic] for permanent disability and loss of use of the spine."

The Appellant's Brief cited no legal authority, nor did he make any argument to the Appellate Panel as to whether the Hearing Commissioner's findings and conclusions with respect to S.C. Code Ann. § 42-9-35 are supported by the greater weight of the evidence or the applicable law.

As a result, the Commission's Appellate Panel issued its final Decision and Order dated July 24, 2017, concluding

> "1. Pursuant to S.C. Code Ann. § 42-9-35, an "employee shall establish by a preponderance of the evidence, including medical evidence, that ...the subsequent injury aggravated the pre-existing condition." (emphasis added). Use of the term "shall" mandates that this burden of proof is mandatory. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)("under the rules of statutory

interpretation, use of the words 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). Based upon the greater weight of the evidence and the established facts of this case, § 42-9-35 applies to the present claim for benefits. The Hearing Commissioner ruled that the *"Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-existing condition. In fact, the records of the Claimant's treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and the Claimant's own statements to Dr. Bailey indicate that his neck problems began in January 2010."* The Hearing Commissioner's rulings in this regard were correct and, furthermore, because they were not appealed, they are affirmed as the law of the case.

2. Because the Claimant has failed to satisfy his burden of proof under S.C. Code Ann. § 42-9-35, he is not entitled to any benefits under the Workers' Compensation Act as a matter of law." (emphasis original).

The Appellate Panel reversed and vacated the remainder of the Hearing Commissioner's conclusions of law, including the award of benefits under S.C. Code Ann. § 42-9-30. The present appeal ensued.

Arguments

I. At no time did the Respondents admit liability for any benefits under the Workers' Compensation Act.

The Appellant inexplicably argues that "liability was admitted" by the Respondents and that this "fact" is the law of the case.[1] This argument is wholly without merit. While the Respondents did admit that the Appellant sustained an accident involving his cervical spine on its Form 51, the Respondents specifically denied liability for any workers' compensation benefits. Not only did the Respondents specifically deny the extent of the injury, the Respondents specifically denied that the Appellant was entitled to any medical or compensation benefits.[2] Similarly, on their Form 58, Pre-Hearing Brief, the Respondents denied the Appellant was entitled to any benefits under S.C. Code Ann. § 42-15-60 or § 42-9-30. Hartzell v. Palmetto Collision, 415 S.C. 617, 785

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[1] The Appellant also misstates the Hearing Commissioner's finding, suggesting that the Hearing Commissioner found that "liability was admitted." This is incorrect. The Hearing Commissioner noted only that the Respondents "admitted the claim," *i.e.*, admitted that the claim met the requirements of S.C. Code Ann. § 42-1-160.

[2] The Appellant has a heightened burden of proof under S.C. Code Ann. § 42-15-60, which requires him to prove his entitlement to medical benefits with expert medical evidence stated to a reasonable degree of medical certainty. Hartzell v. Palmetto Collision, 415 S.C. 617, 785 S.E.2d 194 (Ct. App. 2016). However, the Appellant has abandoned his claim for medical benefits on appeal and presently makes no argument that he is entitled to benefits under S.C. Code Ann. § 42-15-60.

S.E.2d 194 (Ct. App. 2016) (holding that "the General Assembly has placed the burden upon the claimant to prove entitlement to worker's compensation benefits.") (internal citations omitted). At no time did the Respondents admit liability for any benefits under the Act.

Simply because the Respondents admitted the existence of an injury under S.C. Code Ann. § 42-1-160, the Appellant is not absolved of his burden of proving his entitlement to benefits under the Workers' Compensation Act. Instead, the burden is upon the Appellant to prove by a preponderance of evidence that he is entitled to the benefits he claims under S.C. Code Ann. § 42-9-30[3], (scheduled compensation benefits). *See* Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E.2d 172 (1990) (holding that an "award under the scheduled loss statute, however, is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific 'member, organ, or part of the body.').

Not only must the Appellant prove he has a permanent loss of use of his back, but he must also prove that alleged loss is causally-related to the dove field incident on September 4, 2010. Here, the Respondents, in their Form 58, denied that any loss of use of the back was causally-related to the dove field incident. Again, the burden was upon the Appellant to prove, with actual evidence, that his alleged loss of use was casually-related before he can properly be awarded benefits under S.C. Code Ann. § 42-9-30. Bundrick v. Powell's Garage, 248 S.C. 496, 151 S.E.2d 437 (1966) (holding that an award of benefits under S.C. Code

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[3] Note that the Appellant has abandoned his claims to benefits under any other provision of the Workers' Compensation Act.

Ann. § 42-9-30 must be founded on evidence of sufficient substance and not mere surmise, conjecture, or speculation). The Respondents' admission under S.C. Code Ann. § 42-1-160 is neither an admission that the Appellant has either permanent loss of use of his back, nor an admission that any such permanent loss of use is causally-related to the work accident. As such, the Appellants allegations regarding the Respondents' admission is neither factually accurate, nor legally relevant.

II. S.C. Code Ann. § 42-9-35 is a mandatory, statutory pre-requisite to compensation benefits when there is a pre-existing condition, not an affirmative defense.

In addition to the Appellant's burden of proof under S.C. Code Ann. § 42-9-30, the Appellant is subject to an additional, mandatory burden of proof under S.C. Code Ann. § 42-9-35. Section 42-9-35, governs "Compensation and Payment Thereof" (chapter title) when there is "Evidence of pre-existing injury or condition" (the code section title). This statute clearly, and unequivocally, requires

> "(A) The employee shall establish by a preponderance of the evidence, including the medical evidence that: (1) the subsequent injury aggravated the pre-existing condition..."

Simply because the Respondents admitted that the Appellant's claim met the requirements of S.C. Code Ann. § 42-1-160, the Appellant's burden of proof under S.C. Code Ann. § 42-9-35 is not eliminated, as these are separate statutes

governing separate issues. At no time did the Respondents concede that the requirement of § 42-9-35 had been met.

More importantly, the Appellant attempted to conceal the fact of his pre-existing condition from the Respondents, who were unaware of his prior diagnosis and treatment for neck problems at the time the Forms 50 and 58 were filed. Not only did the Appellant deny the very existence of his pre-existing condition on his Form 50, he claimed that he did not "recall" seeking treatment for his pre-existing condition when testifying before the Hearing Commissioner. This led to the Appellant being impeached with his prior medical records (which were received by the Respondents on the eve of the hearing) and the Hearing Commissioner's (unappealed) finding that

> "I did not find [Appellant's] testimony to be very credible with regard to the extent of his pre-existing neck condition..." (Finding of Fact # 15).

Furthermore, § 42-9-35 is not, as the Appellant suggests, an affirmative defense. The very face of the statute makes it plain that the only burden is placed squarely upon the Appellant – "[t]he employee shall establish" – and no affirmative obligation is placed upon the Respondents. Of course, the use of the term "shall" indicates that the Appellant's burden of proof under § 42-9-35 is mandatory. *See* Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("under the rules of statutory interpretation, use of the words 'shall' or 'must'

indicates the legislature's intent to enact a mandatory requirement."). In addition, "[t]he difficulty in proving a fact compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party." Lorick v. S.C.E.&G., 245 S.C. 513, 524, 141 S.E.2d 662, 668 (1965) (internal citations omitted).

Lastly, the Appellant's argument that he was somehow unaware that he was required to meet his burden of proof under S.C. Code Ann. § 42-9-35, as a pre-requisite to an award of compensation benefits, is specious. Of course, it is a well-established principle "that ignorance of the law is no excuse." State v. Binnarr, 400 S.C. 156, 160 n.7, 733 S.E.2d 890, 892 n.7 (2012). Furthermore, the Respondents did not receive the Appellant's prior medical records, detailing the extent of his pre-existing injury and treatment, until the eve of the hearing. At the call of the hearing on July 15, 2015, a pre-hearing conference was held with the Hearing Commissioner, at which time the Respondents clearly raised the Appellant's burden of proof under S.C. Code Ann. § 42-9-35. (Hrg. T. p.9, lines 4—19). The Appellant did not object to this issue being raised at the hearing, nor did the Appellant seek an adjournment or postponement to obtain the necessary proof. Thereafter, the Hearing Commissioner specifically ruled on S.C. Code Ann. § 42-9-35 and the Appellant did not appeal, making her ruling as to his failure to meet the requirements of this mandatory statute the law of the case.

III. The Commission's conclusion that the Appellant failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 is the law of the case and cannot be disturbed on appeal.

Pursuant to S.C. Code Ann. § 42-9-35, the Hearing Commissioner entered the following conclusion of law:

> "The [Appellant] did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-existing condition. In fact, the records of the [Appellant's] treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and the [Appellant's] own statement to Dr. Bailey indicate that his neck problems began in January 2010."

The Appellant's Form 30, Request for Commission Review, makes no mention of this legal conclusion and raised no argument with regard to the application of S.C. Code Ann. § 42-9-35 in his brief to the Commission's Appellate Panel. Therefore, the Appellate Panel properly concluded that the Hearing Commissioner's above-cited ruling with respect to § 42-9-35 is the law of the case. Atlantic Coast Builders v. Lewis, 398 S.C. 323, 329 (S.C. 2012) (citing Buckner v. Preferred Mut. Ins. Co., 2255 S.C. 159 (1970) for the proposition that "an unappealed ruling, right or wrong, is the law of the case.").

The Hearing Commissioner also made a specific finding of fact regarding the Appellant's credibility (or rather, *lack thereof*) regarding this seminal issue under S.C. Code Ann. § 42-9-35. According to the Hearing Commissioner:

> "I do not find [the Appellant's] testimony to be very credible with regard to the extent of his pre-existing neck condition and his current symptomology."

This finding was likewise not appealed and is the law of the case.

Because the Appellant failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 and because an award of benefits under the Act must be necessarily predicated on meeting this statutory burden, the Appellate Panel properly concluded that Commissioner Taylor erred as a matter of law in awarding benefits. Therefore, the Hearing Commissioner's award of benefits under S.C. Code Ann. § 42-9-30(21) and § 42-15-60 was reversed and vacated.

The Appellant makes no argument that he somehow met his burden of proof under S.C. Code Ann. § 42-9-35, nor does he claim that he preserved any such argument for appeal. Instead, he now argues, for the first time on appeal, that S.C. Code Ann. § 42-9-35 was not timely raised. Though specious, the Appellant could have made this argument to the Hearing Commissioner, or perhaps even to the Commission's Appellate Panel, but he did not raise it at all. Therefore, this argument is not properly before the Court on appeal. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be 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.") (internal citation omitted).

IV. The Appellant's argument regarding the propriety of the Hearing Commissioner's award under S.C. Code Ann. § 42-9-30 is not properly before the Court, as the Workers' Compensation Commission reversed and vacated this award in its final Decision and Order.

The Hearing Commissioner's award of benefits under S.C. Code Ann. § 42-9-30 was reversed and vacated by the Commission's Appellate Panel. Because the Appellate Panel is the "ultimate fact finder and is not bound by the single commissioner's findings of fact," the previous findings of the Hearing Commissioner to the contrary are irrelevant. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). In fact, the reversal of the Hearing Commissioner's Order leaves it as if it had never been rendered – it is essentially no longer in effect or existence. Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995). Furthermore, the only appeal to this Court lies from the Final Decision and Order of the Appellate Panel. S.C. Code Ann. § 42-17-60.

However, even if the Hearing Commissioner's *vacated* award of benefits under S.C. Code Ann. § 42-9-30 were properly before the Court of appeal, it is clear that the Hearing Commissioner committed no legal error in considering the fact that the Appellant is currently earning $102,250.00 per year as the Deputy Director of the Department of Natural Resources and has missed no time from work in denying his claim for permanent and total disability benefits. Specifically, the Hearing Commissioner considered these admitted facts in the context of weighing the credibility of Dr. Bailey's opinions on impairment, which

included the fallacious statement that the Appellant was "unable to return to work." According to the Hearing Commissioner:

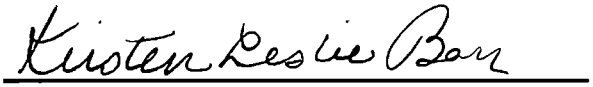
> "Based on [the Appellant's] return to work and promotions received since his original date of injury, I give Dr. Bailey's revised Form 14B very little weight due to his opinion that the [Appellant] couldn't return to his current employment. That opinion is completely disproven by the facts of the case and calls into question the additional information placed in the revised Form 14B."

Not only is the Hearing Commissioner's finding in this regard factually correct and within the Hearing Commissioner's discretion to weigh and judge the credibility of the evidence, but the Appellant did not appeal this finding. Therefore, right or wrong, it is the law of the case. Buckner v. Preferred Mut. Ins. Co., 2255 S.C. 159 (1970).

Conclusion

Based upon the foregoing, the Respondents, the South Carolina Department of Natural Resources and the State Accident Fund, respectfully request that the final Decision and Order of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,



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151\81 \Initial Brief of Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
T. Scott Beck, Commissioner

W.C.C. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee,.....Appellant,

v.

SC Department of Natural Resources, Employer, and
South Carolina State Accident Fund, Carrier.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that she served the above-named Appellant, Chisolm Frampton, with copies of the Respondents' Initial Brief and Designation of Matter this 28th day of November 2017, by depositing copies of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

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November 28, 2017

The Honorable Jenny Abbott Kitchings
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Re: Chisolm Frampton v. SC Department of Natural Resources
W.C.C. File No.: 1012533
Appellate Case No.: 2017-001764
Carrier File No.: 2010-3478
Date of Accident: September 4, 2010

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Brief of the Respondents and Designation of Matter, with accompanying Proof of Service, in the above-referenced matter. By copy of this letter, I am serving the other counsel of record with a copy of these documents. If you should have any questions, please do not hesitate to contact me.

Yours very truly,

Kirsten L. Barr

KLB/cnc/les
Enc.
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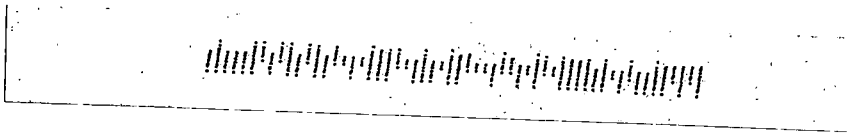

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SC Court of Appeals

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