THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Case No. 2017-001797

David Eastman, d/b/a Grading and Landscaping Material Company, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
South Carolina Contractor's Licensing Board, Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This appeal originates from a complaint filed with the South Carolina Department of Labor, Licensing and Regulation ("LLR"), South Carolina Contractor's Licensing Board ("the Board").

The complaint alleged that Appellant entered into a verbal agreement with homeowners, the Stauters, in June of 2013 to make significant improvements on their seven (7) acre property and performed contracting work without being properly licensed as a contractor. Appellant and the Stauters agreed that Appellant was to extend and/or rebuild two (2) earthen dams; replace two (2) concrete spillways; install two (2) drainage (PVC) pipes; cut and clear approximately one and a half (1.5) acres of forest; create two (2) culverts with concrete pipes for dirt road access by trucks and equipment; provide grading and earthmoving for the culverts and concrete spillways; transport red clay, fill dirt, and compost at the property; and remove debris from the property. (R. pp. 18–19; p. 33, line 23 –p. 34, line 16; p. 38). Appellant provided the Stauters an invoice ("Invoice 3543") that provided that the Stauters owed him $78,398.28 — the total cost of construction for the work Appellant performed for the Stauters. (R. pp. 49, 146).

On December 17, 2014, following LLR's investigation, Appellant was issued a $500.00 citation for violating S.C. Code Ann. § 40-11-30 (1976, as amended), by way of S.C. Code Ann. § 40-11-110(A)(5) (1976, as amended), by engaging or offering to engage in contracting work or submitting a bid when not properly licensed. (R. p. 143).

Following Appellant's request for a hearing to contest the citation, a citation appeal hearing was held before a hearing officer appointed by the Board on June 6, 2016. (R. pp. 25–140). At the hearing, both parties provided opening and closing statements, called and examined witnesses (both on direct and cross), introduced evidence, and answered numerous questions posed by the hearing officer. At the conclusion of the citation appeal hearing, the hearing officer

upheld the citation, affirmed the citation penalty of $500.00, and ordered that Appellant cease and desist from practicing as a contractor without a license. (R. p. 20, p. 138, line 17–p. 139).

On June 16, 2016, the Board issued its Final Order that provided for the aforementioned sanctions against Appellant. (R. pp. 17–21). In its Final Order, the Board found that after balancing the credibility of the testimony and reviewing the documents submitted, including Appellant's own Invoice 3543, sufficient evidence existed that Appellant's work was over $5,000.00 and that Appellant should have been licensed pursuant to S.C. Code Ann. § 40-11-410(4)(b). (R. p. 20). With respect to the monetary amount at issue, the Board, based on the plain language of the statute, interpreted that the $5,000 construction amount in S.C. Code Ann. § 40-11-30 was for the total cost of construction, therein rejecting Appellant's argument that the regulated concrete work was for less than $5,000. (*Id.*) With respect to the type of work Appellant engaged in, Appellant's testimony regarding his work as well as the type of equipment he used supported the Board's finding that the project included work in connection with concrete forming and placing and included excavating, backfilling, and grading in connection with the concrete construction. (*Id.*) Accordingly, the work Appellant performed constituted general construction, specifically concrete work, and this work required a license.

Appellant timely filed an appeal of the Board's decision to the South Carolina Administrative Law Court ("ALC") in July of 2016.

After a thorough briefing by both parties, the ALC issued its Final Order & Decision ("ALC Decision") on July 28, 2017. (R pp. 2–16). In reviewing the Board's decision in accordance with S.C. Code Ann. §1-23-380, the ALC found that substantial evidence supported the Board's decision to uphold the citation issued to Appellant, as the work that Appellant engaged in and the monetary amount related to said work that Appellant engaged in required a license, and Appellant's work was not exempt from the contractor licensing requirements of this

state. In affirming the Board's Final Order, the ALC found that the plain language of the governing statutes supported the Board's interpretation, and that Appellant had misconstrued the relevant statutes when arguing that Appellant did not need a license to perform the work that he performed. (R pp. 10–13).

Appellant timely filed an appeal of the ALC Decision to this Court on or about August 23, 2017, and filed his Initial Brief on or about September 22, 2017.[1]

This brief follows.

ARGUMENTS

I. The ALC's decision to affirm the Board's Final Order was not affected by an error of law, as the work Appellant performed required a license.

The Board is the entity created by, and charged with, the implementation and the enforcement of S.C. Code Ann. § 40-11-5, *et seq.* (1976, as amended) ("Contractor's Practice Act"). Where an agency has been designated as the single state agency for implementation and enforcement of statutes and regulations, great deference must be accorded to that agency's interpretations of its laws and regulations. *See Hampton Nursing Ctr. v. State Health and Human Servs. Fin. Comm'n*, 303 S.C. 143, 147, 399 S.E. 2d 434, 436 (Ct. App. 1990). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Dunton v. S.C. Bd. of Exam'rs in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

Here, the Board is charged with interpreting and administering the Contractor's Practice Act, and as set forth below, Appellant has set forth no compelling reasons for this Court to

[1] Appellant included an attachment to his Initial Brief, which he referenced in making substantive arguments. *See* Appellant's Br. pp. 10–11. On October 11, 2017, the Clerk of Court returned this attachment to Appellant, explaining that attachments to initial briefs are not permitted pursuant to Rule 208, SCACR. In doing so, the Clerk of Court provided that Appellant's attachment will not be considered and was being returned to Appellant. Respondents have addressed this issue in its Brief, *infra* pp. 14–15.

deviate from either the Board's construction of its statutes or the plain language of the statutes themselves.

Appellant was issued a citation on December 17, 2014, for violating S.C. Code Ann. § 40-11-110(A)(5) (1976, as amended), which provides, in pertinent part, that an individual may be disciplined for violating a provision of the Contractor's Practice Act. (R. p. 143). Specifically, Appellant was cited for violating S.C. Code Ann. § 40-11-30 (1976, as amended), which provides the following:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

As detailed below, Appellant engaged in unlicensed general contracting because the total cost of construction for the concrete work he performed exceeded $5,000.00. In reviewing the Board's decision pursuant to the criteria provided by S.C. Code Ann. § 1-23-380, the ALC found that the Board's decision was supported by substantial evidence and was not affected by an error of law. Following, as the Board appropriately found and as was affirmed by the ALC, Appellant engaged in the unlicensed practice of contracting by performing said work.

A. Pursuant to the language of the statutes, Appellant's work fell within the definition of general construction and concrete work.

Appellant argues that "[i[f David Eastman had done only the concrete work for his customer, the Board would have had no interest in him because of the size of the job and it would not have considered issuing a citation." (Appellant's Final Br. p. 11). The ALC, having reviewed the record and examined the statutes, found that Appellant's work at the Stauters' property was properly considered by the Board to be both general construction as well as concrete work that needed a license. (R. pp. 9–10). As detailed below, Appellant has ignored

the plain language of the governing statutes, including the definitions of "general construction", "general contractor", and "concrete work", which clearly support the Board's findings as well as the ALC Decision that affirmed the Board's Final Order.

When determining what work falls within the scope of contracting, the Contractor's Practice Act's definition section, S.C. Code Ann. § 40-11-20 (1976, as amended), is instructive. By statutorily defining many of the terms used throughout the Contractor's Practice Act, including many of the terms used in S.C. Code Ann. § 40-11-30, the Legislature has provided clear guidance as to what work does — and what work does not — require a license from the Board.

"If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). "[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing." *Gordon v. Phillips Utils., Inc.*, 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

Appellant was issued a citation for engaging in unlicensed general contracting. (R. p. 143). S.C. Code Ann. § 40-11-20(9) (1976, as amended) defines a "general contractor" as "an entity which performs or supervises or offers to perform or supervise *general construction*." (Emphasis added). Next, the Legislature defines "general construction" as "the installation, replacement, or repair of a building, structure, highway, sewer, *grading*, asphalt or concrete paving, or *improvement of any kind to real property*." S.C. Code Ann. § 40-11-20(8) (1976, as amended) (emphasis added).

With respect to whether Appellant engaged in general construction, the ALC properly found that, based on his own admissions, Appellant engaged in general construction. (R. pp. 9–

10). The ALC reviewed Appellant's own admissions: he brought the concrete drainpipes to the Stauters' property for the culverts, installed them, and then constructed the road that went over them. (R. pp. 111–13). In doing so, the ALC properly found that, based on the language of S.C. Code Ann. § 40-11-20(8), "[t]his work at a minimum, inescapably constitutes improvements to real property and falls within the confines of general construction." (R. p. 9).

In addition to the ALC's proper reading of the legislative definition of "general construction" and its applicability with respect to the licensure requirement at issue in S.C. Code Ann. § 40-11-30, the ALC also looked at the specific type of general construction Appellant engaged in. Here, the Legislature has also delineated and identified the various classifications and subclassifications that comprise general contracting. When applying for a license, an applicant must designate which license classifications or subclassifications will constitute its scope of practice. An applicant may apply for and be licensed in more than one classification or subclassification, provided that all qualifications for licensure are met. *See* S.C. Code Ann. § 40-11-270 (A) and (B) (1976, as amended). The licensee is then confined to the limitations of the licensee's license group, license classifications, and license subclassifications, as provided in the Contractor's Practice Act. Accordingly, a licensee must designate in which classifications and subclassifications it will engage.[2]

Appellant was cited for engaging in unlicensed general contracting, specifically unlicensed concrete work. Here, the definition of the "Concrete" subclassification of general contracting provides the scope of the work encompassed by the term in this State and is as follows:

[2] General Contracting is segmented into four classifications: General Contractors–Building, General Contractors–Highway, General Contractors–Public Utility, and General Contractors–Specialty. Each of these classifications is then further segmented into numerous subclassifications. The subclassification at issue in the present case is the "Concrete" subclassification under General Contractors–Specialty. *See* S.C. Code Ann. § 40-11-410(1),(2),(3), and (4) (1976, as amended).

> "Concrete" which includes *all work in connection with concrete forming and placing*; assembling of forms, molds, slipforms and pans; *centering, trenching, excavating, backfill, and grading in connection with concrete construction*; construction of sidewalks, driveways, curbs, medians, and barrier walls; and installing of embedded items essential to or comprising an integral part of concrete or concrete construction including reinforcing elements and accessories including, but not limited to, concrete chimneys, floors, piers, and foundations when using concrete rebar and other materials common to the concrete industry. This subclassification does not include the General Contractor-Highway- Bridge license subclassification or the construction of streets, roads, parking lots, and highways.
>
> S.C. Code Ann. § 40-11-410(4)(b) (1976, as amended) (emphasis added).

The statute defining concrete work is plain and unambiguous. The statute specifically includes "centering, trenching, excavating, backfill, and grading in connection with concrete construction" as concrete work that requires a license. S.C. Code Ann. § 40-11-410(4)(b) (1976, as amended). Appellant completely ignores the "all work in connection with concrete forming and placing" and "centering, trenching, excavating, backfill, and grading in connection with concrete construction" portions of the definition of concrete work to argue that Appellant's work did not fall within the definition of concrete work. To do so is to unnecessarily narrow the scope of concrete work in contravention of the plain language found in the statute.

Appellant asks this Court: "What difference does it make that he also did other admittedly unregulated work for a much larger amount?" (Appellant's Final Br. p. 11). Here, the alleged "unregulated work" performed by Appellant is anything but.

Based on Appellant's own admissions, it is undeniable that the work done by Appellant at the Stauters' property fell within the "concrete" subclassification of general contracting.

At the hearing, Appellant explained the scope and extent of the work that he performed at the Stauters' property. Appellant explained that there was concrete work done at the property but that another company poured the concrete. (R. p. 103, line 16–p. 104, line 24). With respect to the concrete pipes that were installed on the property, Appellant provided the pipes, installed

them at the property, and built the roads that then went over said pipes. (R. pp. 111–13). Appellant testified in order to build the roads that went over the pipes, he performed grading work or "earth moving" around the pipes. (R. p. 113, lines 5–15). While Appellant testified that he did not form the concrete spillways himself, Appellant provided that he "graded it the way Mr. Stauter asked us to grade it and then put the concrete – had Pedro put the concrete down." (R. p. 113, line 24–p. 114, line 1). Appellant then elaborated that in order to have the spillway shaped pursuant to Mr. Stauter's direction, he moved the dirt in such a way as to allow the concrete company to pour the concrete to create a spillway. (R. p. 114).

As appropriately summarized by disciplinary counsel in her closing argument, "[w]hen you look at concrete, it includes all work in connection with concrete forming and placing. So that brings in all of the grading, all of the earth moving, everything that goes into the associated reinforcement and work that goes into the concrete." (R. p. 137, lines 10–15). At the conclusion of the hearing, the Hearing Officer also emphasized these pertinent parts of the concrete definition by identifying that it was those portions of the definition under which it was determined that Appellant engaged in unlicensed concrete work. (R. p. 139, lines 12–21). As the ALC provided, "'concrete work' as defined Section 40-11-410(4)(b) is not so narrowly limited so as to be confined to the actual pouring of concrete." (R. p. 10).

Based on the plain language of the governing statutes, the work Appellant performed required a license.

B. The total cost of construction for Appellant's work exceeded $5,000.

With respect to $5,000 minimum project size required for a licensing requirement to attach, Appellant argues the Board has not explained its rationale for the interpretation of the statute it advocates and provides that ""the Commissioner's decision does not address the issue at all." (Appellant's Final Br. p. 11–12). Appellant continues to provide that "[i]ts brief to the [ALC] only refers to the statutory definition of the 'total cost of construction' in S.C. Code § 40-11-20(23). That section does not address the question of how to interpret the $5,000 minimum for licensing." (Appellant's Final Br. p. 12). Here, Appellant ignores basic rules of statutory interpretation. *See Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 129, 750 S.E.2d 61, 63 (2013) (providing that "[w]ithin a single statutory scheme, the same word should be given consistent meaning.") As the ALC appropriately summarized, Appellant "misconstrues the statutes." (R. p. 10). The ALC found that "pursuant to Sections 40-11-20(23) and 40-11-30, 'the total cost of construction,' is not merely limited to the cost of material but rather, for the total amount of general construction: not just the concrete materials and/or labor." (*Id.*)

S.C. Code Ann. § 40-11-30 (1976, as amended) requires that an individual be licensed by the Board if he practices "as a contractor by performing or offering to perform contracting work for which the *total cost of construction* is greater than five thousand dollars for general contracting . . . ." (emphasis added). The Legislature has clarified the meaning of "total cost of construction" by defining the term as follows:

> the actual cost incurred by the owner, all contractors, subcontractors, and other parties for labor, material, equipment, profit, and incidental expenses for the entire project. This does not include the cost of design services unless those services are included in a construction contract.
>
> S.C. Code Ann. § 40-11-20(23) (1976, as amended).

With respect to the total cost of construction of Appellant's work, the record is replete with evidence that the total cost of construction, as that term is defined by statute, far exceeded $5,000.

When asked how much did Mr. Stauter agree to pay for all of Appellant's work, Mr. Stauter provided that he initially paid Appellant $22,500 for the work Appellant was hired to do at the Stauters' property. (R. p. 34 line 24–p. 35, line 5). As the work progressed, the Stauters paid an additional $14,000 to Appellant to perform the work, as Appellant encountered various setbacks and needed additional material for the work. (R. p. 35, lines 6–18). In total, the Stauters testified that they paid Appellant approximately $36,500 for the work done on their property. (R. p. 35, lines 19–23).

The hearing officer did not have to rely solely on the Stauters' testimony regarding the total cost of construction in order to determine whether Appellant's work exceeded the $5,000 minimum threshold. In addition to Mr. Stauter's testimony, Appellant's own invoice he provided to the Stauters as well as Appellant's own admissions at the hearing confirm that the total cost of construction for the work done at the Stauters' property far exceeded the $5,000 minimum threshold.

After completion of the project, the Stauters requested receipts and documentation regarding the work done by Appellant on their property. (R. p. 45, lines 18–21). Soon after, a packet of documents from Appellant was left in their mailbox. (R. p. 46). Chief among those documents was an invoice, which provided that Appellant performed work on the Stauters' property from approximately June 11, 2013, to November 13, 2013, and that the total dollar amount of the work amounted to $78,398.28. (R. pp. 49, 123, 146). On cross-examination, Appellant clarified that the total amount of the work done at the Stauters' property was

$78,398.28, that they had already paid approximately $36,500, leaving a balance of $42,000 that, according to Appellant, remained outstanding. (R. pp. 119–21).

Appellant argues that the statute is silent to the issue of "what happens when a contractor doing a large job which is exempt from the licensing process preforms a small amount of work where a license would be required if that work exceeded $5000." (Appellant's Final Br. p. 9). He continues to argue that "[n]ot only is the statute silent of this issue, there is no indication that it has ever been considered by a court in this state." (*Id.*) Appellant's argument is without merit.

First, "concrete" work, by statute, is not confined solely to the act of pouring concrete. *See* S.C. Code Ann. § 40-11-410(4)(b)[3]. Appellant's work, including but not limited to grading, earth moving, and installation of pipe, constituted general construction and was performed in connection with concrete construction. Second, the "total cost of construction" is not so narrowly defined as to include only the amount of materials; rather, it is defined, in pertinent part as, "the actual cost incurred by the owner, all contractors, subcontractors, and other parties for labor, material, equipment, profit, and incidental expenses for the entire project." S.C. Code Ann. § 40-11-20(23). Despite Appellant's argument that S.C. Code Ann. 40-11-20(23) "does not address the question of how to interpret the $5000 minimum for licensing," this statutory definition of "total cost of construction" makes clear that Appellant needed a license for the total amount of work that was done at the Stauters' property. (Appellant's Final Br. p. 12).

Finally, while his argument is unclear and difficult to ascertain, Appellant references S.C. Code Ann. § 40-11-300(A) in his Brief in support of the aforementioned argument. (Appellant's Final Br. p. 9).

"An issue may not be raised for the first time on appeal, but must have been raised to the [factfinder] to be preserved for appellate review." *State v. Walker*, 366 S.C. 643, 660, 623

[3] This statute is discussed extensively in Section I.A. of Respondents' Final Brief, *supra* pp. 5–9.

S.E.2d 122, 130 (Ct. App. 2005). "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Nicholson v. Nicholson*, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008).

This is the first time Appellant has made any argument regarding S.C. Code Ann. § 40-11-300(A). This issue was never raised to or ruled upon by the hearing officer at the citation appeal hearing held on June 3, 2016. In fact, Appellant never brought this statute or any related argument regarding this statute to the attention of the hearing officer or the ALC. Accordingly, an appellate court necessarily cannot evaluate whether the Board committed error on an issue it never heard. Accordingly, this Court should find Appellant's argument regarding S.C. Code Ann. § 40-11-300 unpreserved for appellate review.[4]

C. This Court should defer to the Board's interpretation of its statutes, as Appellant has failed to provide any compelling reasons for this Court not to do so.

"[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014) (internal citations omitted). Not only are the statutes at issue here clear

[4] In any event, S.C. Code Ann. § 40-11-300 is inapplicable to the present case, as it provides that licensees cannot circumvent the requirement that they obtain the appropriate classifications and subclassifications by dividing work into portions. In fact, S.C. Code Ann. § 40-11-300 echoes S.C. Code Ann. § 40-11-30 and provides that the "total cost of construction must be used to determine the appropriate license group for a project."

and unambiguous, but the Board's interpretation of those statutes was appropriate and was in conformance with the statutes' plain language. Appellant argues that deference is not warranted in this situation. However, he fails to provide a single compelling reason for this Court to not defer to the Board's interpretations.

i. Appellant's interpretation of the statutes is too narrow, as the Board was abiding by the plain language of the statutes.

Appellant first argues that "there is nothing in the statute that compels extending the licensing requirement in this situation" and that the "Agency's interpretation would logically extend its licensing requirements to almost comical situations." (Appellant's Final Br. p. 9). To illustrate, Appellant provides that an unlicensed landscaper installing a fence post that poured a single bag of concrete mix into the post hole would be in violation of the statute. Appellant's exaggerated hypothetical only highlights his misunderstanding of the decisions made by the Board and the ALC.

Appellant's hypothetical cannot withstand scrutiny for a number of reasons. One, the agency is not extending its licensing requirements, but rather following the plain language of the statutes that it is charged with implementing. Two, this hypothetical is not the equivalent of the work performed here, which was in excess of $78,000 and involved, at the very least, "centering, trenching, excavating, backfill, and *grading in connection with concrete construction*." Further, the work Appellant did in the instant case was in connection with concrete construction. In contrast, in Appellant's exaggerated hypothetical, pouring a bag of concrete to install a fence post would not properly be characterized as work "done in construction with concrete construction." The Board's decision to affirm the citation against Appellant does not extend the licensing requirement to require anyone using concrete in any project to become licensed by the Board. Here, the Legislature has not required every instance of using concrete in a project as

requiring a concrete specialty license, and the Board's well-respected deference should be trusted in not extending the licensing requirement as such. *See Montgomery v. Spartanburg Cnty. Assessor*, 419 S.C. 77, 82, 795 S.E.2d 866, 868 (Ct. App. 2016) ("If possible, the [c]ourt will construe a statute so as to escape [an] absurdity and carry the [General Assembly's] intention into effect.") (internal citations omitted).

Appellant's work in the present case fell squarely within the licensing requirements. It should not be likened to an exaggerated hypothetical that subverts the Board's ability to use its experience, technical competence, and specialized knowledge to evaluate cases. S.C. Code Ann. §1-23-330(4). These two scenarios could not be more different and should not be conflated.

ii. Appellant's inappropriate attachment of an exhibit to his Initial Brief should be disregarded.

Next, Appellant argues that the Board has changed its position on the minimal $5,000 requirement, and argues that because it has changed its position, the Board's interpretations of its own statutes should not be given deference. (Appellant's Final Br. p. 10–11). In making this argument, Appellant quotes and attaches a Board publication that was *never* presented at the initial hearing, that was *never* included in the Record on Appeal at the ALC, that was *improperly attached* to his reply brief he filed at the ALC *after* both the Record on Appeal and Respondents' Brief were filed with the ALC[5], that was *never* included in the Designation of Matter submitted to this Court, and that was *again* erroneously attached to Appellant's Initial brief as Exhibit A. Notably, on October 11, 2017, the Clerk of Court returned this attachment to Appellant's initial Brief and explained to Appellant that attachments to initial briefs are not permitted pursuant to

[5] Appellant's attachment was included for the first time in these proceedings in his reply brief at the ALC. Appellant's reply brief was filed 10 days after Respondents' Brief, pursuant to SCALC Rule 37, and necessarily was not included in the ALC's Record on Appeal.

Rule 208, SCACR. In doing so, the Clerk of Court provided that Appellant's attachment will not be considered and was being returned to Appellant.

There are a number of fundamental issues with this argument Appellant has raised. In addition to violating Rule 208, SCACR by including attachments in his initial brief as identified by this Court's Clerk of Court, Appellant is also in violation of Rule 210, SCACR. Specifically, Rule 210(c), SCACR, provides, in pertinent part, that "[t]he Record shall not . . . include matter which was not presented to the lower court or tribunal." *See also* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.")

Finally, Appellant cannot raise this issue for the first time on appeal, but must be raised before the factfinder, here during the citation appeal hearing, to preserve it for appellate review. *See State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 130 (Ct. App. 2005). This exhibit, and any argument related to the exhibits, were not presented to the hearing officer.

Accordingly, this attachment and any substantive argument related to the contents of the attachment should not be considered by this Court, as they are not properly before this Court.[6]

II. Appellant's work does not fall within any exemption to the licensing laws governing contractors in this state.

Appellant argues that "Heavy Construction" is exempt from the licensing requirements and that "[d]am construction has always been included in the category of Heavy Construction." (Appellant's Final Br. p. 12). Appellant concedes that there is "no definition of Heavy Construction" in the Contractor's Practice Act and "the rationale for excluding it has not been

[6] In addition to never making this argument until he filed his reply brief at the ALC, Appellant's summation of the ALC's response to his improperly attached exhibit is misleading, as the ALC actually provided that the attachment does not "conflict with the Department's order, this court's order, or the statutes at issue as substantial evidence supports a finding that the Appellant's work did not fall within these exempt classifications." (R p. 11, n. 8). Thus, even though inappropriately attached to his Brief, Appellant's exhibit does not support his argument.

published," but that he "believes and has argued below that the logical reason for excluding it is that dams, dam construction and dam maintenance are strictly regulated by other agencies" and that "[s]ince the [Board] is not involved in any way with dam construction, it should not be involved in examining or licensing contractors to do such work." Appellant continues and provides that having the Board "involved in dam work creates a double set of regulations and regulators and creates a potential for conflicting requirements." (Appellant's Final Br. pp. 12–13).

Appellant is correct in that these issues have already been argued below at the ALC, which correctly found that Appellant's contentions were without merit. With respect to heavy construction, the ALC held that "[t]here is nothing contained in subsection 40-11-360(A) that expressly or impliedly includes an exception for what the Appellant has deemed as 'heavy construction.'" (R. p. 13). This Court should follow the ALC's decision on this issue and find that the Legislature has not provided, either expressly or impliedly, for a heavy construction licensing exemption.

S.C. Code Ann. § 40-11-360(A) provides a lengthy list of work and/or entities for which the Contractor's Practice Act does not apply. As explained by the disciplinary counsel at the citation appeal hearing, "[S.C. Code Ann. §] 40-11-360 contains all of the exceptions from the application of the chapter, meaning all of the exemptions to the licensing requirements." (R. p. 134, lines 6–8). Following, disciplinary counsel then individually addresses each of the ten (10) exemptions provided for in the statute and explains how none are applicable in the present case. (R. pp. 134–36). Accordingly, despite Appellant's belief that "Heavy Construction" and "Heavy Contractors" are wholly exempt from the Contractor's Practice Act, including the licensing requirements, the plain and unambiguous language of the statute that outlines the numerous

exceptions to the Contractor's Practice Act does not include such an exemption and simply does not support his argument.

Similarly, the ALC correctly found that Appellant's argument that dam work does not fall within the jurisdiction of the Board because it is regulated by the South Carolina Department of Health and Environmental Control ("DHEC") (which regulates dam construction when a federal agency does not assume jurisdiction) was also without merit. In addressing Appellant's identical argument that having multiple agencies involved with dam construction would create a "double set of regulations and regulators and create a potential for conflicting requirements," (Appellant's Final Br. p. 13) the ALC disagreed with Appellant and provided the following:

> While both the Board and DHEC are charged with protecting the public health, safety and welfare by regulating various entities and operations, it is clear that they oversee and regulate distinctly different realms. DHEC is charged with insuring that dams within its purview are properly designed and engineered to minimize the risk of dam failure, and injuries to people and property. The Board is charged with insuring that those who provide contracting services in this State are properly doing so. The court agrees with the Department that DHEC's oversight and regulation of certain dams dovetails with the Department's regulation, oversight and licensing of the contracting profession.
>
> In reviewing various regulations promulgated pursuant to the [Dam and Reservoirs Safety] Act, it is clear that the focus of DHEC's regulation is in insuring that the dams that fall within its jurisdiction are properly designed to avoid catastrophic failure. *See e.g.*, S.C. Code Ann. Regs. 72-1 et seq. (1997). As the Appellant properly synopsized, the essential purpose of licensing contractors is to insure that the work done by contractors is performed in proper and workmanlike fashion. To this end, the physical construction performed by contractors on any given project in this state whether it be dam or otherwise, is regulated by the Board.
>
> (R. p. 14)

DHEC's Dams and Reservoirs Safety Act ("Dam Act") outlines DHEC's authority and responsibility for maintaining dams and reservoirs in South Carolina. *See* S.C. Code Ann. § 49-11-110 *et seq.* (1976, as amended). The Dam Act's Declaration of Purpose, codified at S.C. Code Ann. § 49-11-130, succinctly outlines the Dam Act's purpose, as follows:

> It is the purpose of this article to provide for the certification and inspection of certain dams in South Carolina in the interest of public health, safety, and welfare in order to reduce the risk of failure of the dams, prevent injuries to persons and damage to property, and confer upon the department the regulatory authority to accomplish the purposes.

In contrast, the Board's stated purpose, as codified at S.C. Code Ann. § 40-11-10(A) (1976, as amended), is "to protect the health, safety, and welfare of the public through the regulation of businesses and individuals who identify, assess, and provide contract work to individuals or other legal entities through the administration and enforcement of this chapter and any regulation promulgated under this chapter and Article 1, Chapter 1." While both DHEC and the Board seek to protect the public health, safety, and welfare by regulating various entities and operations, it is clear that the agencies oversee and regulate distinctly different professional spheres. Like the ALC found, DHEC's regulation and oversight of certain dams dovetails with LLR's regulation, oversight, and licensing of the contracting profession, as each has a different focus striving for the same result: protecting the public health, safety, and welfare of the citizens of South Carolina. (R. p. 14).

In reviewing the various regulations promulgated pursuant to the Dam Act, it is clear that the focus of DHEC's regulation is ensuring that the dams that fall within its jurisdiction[7] are properly engineered so as to avoid catastrophic dam failures. *See, e.g.*, S.C. Code Ann. Regs. 72-1 *et seq*. In contrast, the essential purpose of licensing contractors is to ensure that the contracting work done by said contractors is performed in a proper fashion. To this point, the actual physical construction done by contractors on a given project in this state, whether it be a dam project or otherwise, is regulated, in part, by the Board.[8] In contrast, and as detailed in the

[7] Not all dams are regulated by DHEC's Dam Act. *See* S.C. Code Ann. § 49-11-120(4) (1976, as amended) (identifying four categories of dams that are not regulated by DHEC).

[8] In addition to the Board's regulation of contractors, contracting projects performed in this state are also subject to permitting and inspection by local jurisdictions, when applicable. *See* S.C. Code Ann. § 40-11-420(A) (1976, as amended).

Dam Act's regulations, DHEC's primary regulatory concern is that the dams that fall within its jurisdiction are properly engineered. This is evident throughout S.C. Code Ann. Regs. 72-3, which goes into great detail regarding the permitting procedures and requirements for dam work. *See, e.g.* S.C. Code Ann. Regs. 72-3(D)(1)(b) (outlining the involvement of engineers in the permitting process for dams); S.C. Code Ann. Regs. 72-3(D)(2) (listing the requirements for dam construction permits, which focus on engineering oversight and design). In fact, the only mention of contractors in DHEC's regulations governing permitting procedures and requirements provides, with respect to repair permit applications, an engineering design that consists of drawings and specifications must include "[g]eneral provisions that specify the rights, duties and responsibilities of the applicant, applicant's engineer, *contractor*, and the prescribed order of work." S.C. Code Ann. Regs. 72-3(D)(3)(b)(6) (emphasis added). As the ALC properly found, "the Act's regulations reference to contractors clearly take into account the import of licensed contractors executing the physical construction of related projects." (R. pp. 14–15).

CONCLUSION

The Legislature has explained, in concrete terms, what work requires a contractor's license in this state. The Board appropriately followed the clear and unambiguous language of the governing statutes when it found that Appellant needed to be licensed to engage in the type of work he engaged in without a license. The ALC, as provided in its Decision, appropriately found that the Board committed no error of law in reaching its decision and that its ruling was supported by substantial evidence on the record. Accordingly, this Court should affirm the ALC Decision.

(*signature on following page*)

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Case No. 2017-001797

David Eastman, d/b/a Grading and Landscaping Material Company, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
South Carolina Contractor's Licensing Board, Respondents.

CERTIFICATE OF SERVICE BY MAILING

I hereby certify that I have this day served Respondents' Final Brief and Certificate of Counsel onto the Court and Counsel for Appellant, by hand delivery and by mailing first class, respectively, to the following addresses:

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