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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 5528
(Filed January 10, 2018)

Robert L. Harrison, Employee, ... Petitioner,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier, ... Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO CORRECTED PETITION FOR WRIT OF CERTIORARI

Respondents Owen Steel Company, Inc. and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc. hereby oppose Petitioner Robert L. Harrison's Corrected Petition for Writ of Certiorari ("Petition") for review of the Court of Appeals' Opinion No. 5528, filed January 10, 2018. As an initial matter, Harrison's Petition cites no case law or other authority for his positions. This both serves as a ground to deny his Petition, *see* In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal); Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"), and also reveals the lack of any legal support for his positions.

Furthermore, the only reason this case even arguably presents a novel question of law, which Respondents do not concede, is solely due to Harrison's counsel's attempt to "game" the Workers' Compensation Act ("Act") and not, as Harrison would have this Court believe, the result of any legitimate question of law or any particular error in the Court of Appeals' Opinion. If this Court grants certiorari review, which Respondents oppose, it should be only to caution parties and counsel to not attempt to play fast and loose with the Act. Although Respondents disagree with the Court of Appeal's resolution of the laches issue, the Court correctly affirmed the Commission's denial of additional benefits for Harrison's 2008 claim.

STATEMENT OF THE CASE

Harrison suffered an admitted workplace injury to his cervical spine on September 17, 2008, while he was working as a Gantry welder for Owen Steel Company.[1] (R. p. 309, lines 8-21). Respondents provided medical treatment, including a cervical fusion, and compensation while Harrison was recovering. (R. p. 309, line 22 – p. 310, line 9). This matter was assigned W.C.C. File No. 0824526. He returned to work with Owen Steel in various capacities and now works as lead man on the night shift, making more money than he made prior to his injury. (R. p. 310, line 25 – p. 311, line 11) (R. p. 312, lines 3-24) (R. p. 314, lines 1-2).

On October 4, 2010, Harrison suffered a second workplace injury to the same body part – his cervical spine – that he injured in 2008. (R. p. 314, lines 15-21) (R. pp. 141-143). In the fall of 2011, Harrison settled his 2010 claim with Owen Steel. (R. p. 121) (R. p. 307). That matter was assigned W.C.C. File No. 1013900.

[1] Owen Steel's workers' compensation carrier at that time was Old Republic General, jointly referred to herein as Respondents.

On December 13, 2011, the Commission sent Harrison's counsel a letter inquiring whether he planned to proceed with his claim in this matter. (R. p. 107). Harrison's counsel responded that he did, in fact, "plan to pursue this claim." (R. p. 108).

Harrison filed a Form 50 on April 24, 2013, (R. pp. 333-334), a corrected Form 50, (R. pp. 335-336), and finally a second corrected Form 50 dated May 8, 2013, seeking additional compensation and medical treatment, alleging injury and change of condition to "back, neck/cervical spine, right shoulder, left shoulder" among other alleged injuries. (R. pp. 298-299). All of Harrison's Form 50s listed an incorrect workers' compensation file number, W.C.C. File No. 0804580,[2] and sought to have the matter combined with W.C.C. File No. 1013900, which is the file number assigned to his 2010 workplace injury.

Respondents filed a Form 51 denying Harrison's claim for further medical care and/or compensation benefits. Among other defenses, Respondents asserted that Harrison's current complaints were not related to his 2008 work-related accident, and that his claim was barred by section 42-15-40 of the Act. (R. pp. 300-301).

After the parties submitted evidence and presented testimony, the Single Commissioner issued an opinion finding, among other things, that Harrison's current claim was time barred because it neither was filed within two years of the accident nor within two years of the last payment of compensation. (Single Commissioner Decision & Order, filed Nov. 7, 2013, R. pp. 244-253 ("2013 Single Commissioner Decision")).

[2] W.C.C. File No. 0804580 relates to a claim involving an April 21, 2008 incident, not the September 17, 2008 accident that is the subject of W.C.C. File No. 0824526. (*See* R. pp. 300-301) (R. p. 328, line 17 – p. 329, line 7).

On appeal, an Appellate Panel of the Full Commission heard oral argument on February 18, 2014. At that hearing, Harrison's counsel argued that, "[l]aches was pled as a defense, and it's my understanding that the order ruled against [Respondents' counsel] because it did not find for it in the Commissioner's order." (R. p. 322, lines 19-22). Respondents' counsel stated that, if the Commission overturned the 2013 Single Commissioner Decision on the statute of limitations issue, "then I think we've got to go back and deal with the laches issues." (R. p. 330, line 16 – p. 331, line 4).

The Full Commission reversed the Single Commissioner on the statute of limitations issue and remanded "for findings with regard to issues of intervening accidents, laches, and permanency, which were not determined by the Appellate Panel." (Appellate Panel Decision & Order, filed May 12, 2014, R. pp. 236-243).

On remand, Respondents raised the doctrine of laches, among other defenses. (R. p. 118). After an evidentiary hearing on August 5, 2014, the Single Commissioner held that Harrison's claim was barred by the Doctrine of Laches and that, even if the Doctrine of Laches did not apply, "it would be impossible to determine the Claimant's entitlement to permanent partial disability benefits without speculating," due to the passage of time and intervening accidents. (Decision & Order of Single Commissioner, filed Feb. 12, 2015, R. pp. 33-39 ("2015 Single Commissioner Decision").

Harrison appealed again to the Full Commission. (R. pp. 41-43). An Appellate Panel of the Full Commission affirmed the 2015 Single Commissioner Decision in its entirety. In addition to finding that this claim is barred by Laches, the Commission confirmed that, "even if Laches was not a bar to the receipt of benefits, there have been so many intervening accidents over time, it would be impossible to determine the

Claimant's entitlement to permanent partial disability benefits without speculating." As a result, the "Claimant has not met his burden of proving by a preponderance of the evidence as to what his causally related condition was as a result of the September 17, 2008 accident." (Appellate Panel Decision & Order, filed Sept. 8, 2015, R. pp. 1-23).

Harrison appealed to the Court of Appeals. At oral argument before the Court of Appeals, Harrison's counsel opened his argument by asserting that he knew why prior counsel on this case had pursued the settlement of the 2010 injury before seeking a hearing on the 2008 injury. Harrison's counsel explained that prior counsel had purposefully settled the 2010 injury before seeking a hearing for the 2008 injury in order to avoid, or circumvent, a deduction under Sections 42-9-150 through 42-9-170 of the Act.

The Court of Appeals issued its Opinion No. 5528 on January 10, 2018. First, the Court of Appeals held that laches does not apply, and dismissed the Commission's reasoning that Respondents had been prejudiced with regard to the 2008 injury claim because of Harrison's numerous subsequent injuries to the same body part, given the two impairment ratings rendered by Dr. Holbrook and Dr. Johnson in 2010. However, the Court of Appeals affirmed the Commission's result, albeit on different grounds. Noting that the Harrison's counsel conceded that he had settled the 2010 injury claim before pursuing the 2008 injury claim on purpose, in order to avoid a credit to the Respondents pursuant to Sections 42-9-15 to -170 of the Act, the Court of Appeals referenced cases expressing the Legislature's intent to avoid double-recovery under the Act. The Court of Appeals explained that the AMA Guides, referenced in the Act, provide a method for determining an impairment rating attributable to a second injury to the same body part.

That is, "the most recent permanent impairment rating is calculated, and then the prior impairment rating is calculated and deducted." The Court of Appeals relied on a West Virginia Supreme Court case that involved a claimant with two impairment ratings to the same body part as the result of two successive injuries, where the second rating was lower than the first rating, which held the claimant was not entitled to any additional compensation as a result of the second injury. *See* Wagner v. Workers' Compensation Div., 517 S.E.2d 283 (W.Va. 1998).

Relating the Wagner case to the instant case, the Court of Appeals noted that Dr. Sweet was aware of the prior injury to Harrison's cervical spine and found significant the fact that, despite knowing of the prior injury to his neck, Dr. Sweet still awarded a lower impairment rating. In reaching its conclusion, the Court of Appeals explained, "[w]e doubt the legislature intended to allow an employee, who has suffered successive injuries to the same body part close together in time, to circumvent the operation of statues entitling an employer to credit for previously paid permanent disability benefits by seeking compensation for the second injury before seeking compensation for the first injury."

Harrison moved for rehearing. In their opposition to rehearing, Respondents affirmed the result reached by the Court of Appeals but argued that laches provided an additional basis on which to affirm the Commission Decision. (Appx. pp. 28-33).

FACTUAL BACKGROUND

Following Harrison's September 17, 2008 injury, he began treating with Dr. Thomas J. Holbrook. Harrison was diagnosed with a herniated cervical disc and, on November 10, 2009 Dr. Holbrook performed an anterior cervical discectomy with fusion

and instrumentation on Harrison's cervical spine at C5-C6. (R. pp. 73-78). On July 21, 2010, after Harrison had recovered from surgery, Dr. Holbrook released him at Maximum Medical Improvement ("MMI") with a 50-pound lifting restriction and "a 25% impairment to the whole person." Dr. Holbrook's notes indicate that Harrison "states that he is doing well. He has no radicular arm pain. He will occasionally have some discomfort in the cervical paraspinous muscles which is relieved with aspirin." No future medical care was recommended. (R. pp. 86, 89).

Harrison was involved in a motorcycle crash on April 4, 2010, when a car pulled out in front of his motorcycle. He suffered multiple abrasions and a fractured left clavicle, with complaints of pain in his left shoulder. (R. pp. 137-140) (R. p. 197, line 5 – p. 199, line 16). Although he denied any neck pain at the time he was seen at the ER, he suffered painful abrasions to his "head, hand, left shoulder." (R. pp. 294-297). He testified that he did not inform Dr. Holbrook, his treating physician, of this accident. (R. p. 325, line 21 – p. 326, line 4).

On September 29, 2010, Harrison underwent an Independent Medical Evaluation by Dr. Donald Johnson. Dr. Johnson noted the prior herniation at C5-6, agreed that Harrison was at MMI, and assigned him a 25% impairment rating to the whole body. Dr. Johnson did not recommend any on-going medical care or treatment. (R. pp. 90-91).

On October 4, 2010, Harrison reinjured the same body part at work. (R. p. 314, lines 15-21). Harrison began treating with Dr. Raymond C. Sweet. Dr. Sweet, who recommended against a posterior fusion, saw Harrison on November 2, 2010 and again on November 18, 2010. (R. pp. 141-143). On November 18, 2010, Dr. Sweet noted that Harrison was doing better, and only had some chronic achy back pain. (R. pp. 144-145).

Dr. Sweet also filled out a Form 14B, indicating Harrison had reached MMI as of November 2, 2010, assigning him a 15% impairment rating and a 30 pound lifting restriction, and recommending future medical treatment. (R. p. 146).

In the fall of 2011, Harrison settled his 2010 workplace injury claim (in W.C.C. File No. 1013900) with Respondents for $42,193.63, representing a 28% loss of use of his back, or 84 weeks PPD. (R. p. 121) (R. p. 307). Although Harrison testified at the 2014 hearing that he could distinguish between the problems he currently is having as a result of his 2008 workplace injury and those he is experiencing as a result of his 2010 workplace injury, and despite what he may or may not have understood he was settling with regard to his 2010 injury, he agreed that the problems he experiences from the two workplace accidents are "similar." (R. p. 320, line 13 – p. 321, line 5).

In February 2012, Harrison injured his shoulder while lifting his daughter off the ground which caused neck and shoulder pain that he testified was similar to the problems he experienced following his 2008 workplace injury. (R. p. 317, line 21 – p. 318, line 7; R. p. 226, line 25 – p. 227, line 2) (R. pp. 292-293) (R. pp. 100-103, 147-151). Harrison admitted that the pain he experienced after this event was very similar to the problems he had experienced after his 2008 workplace accident. (R. p. 317, line 9 – p. 318, line 7) ((R. p. 323-A, lines 1-18) .

When asked, Harrison denied that the problems he was having in 2013 were attributable to the 2012 incident where he picked up his daughter. In response, he was asked:

Q: Well, what are they attributable to?
A: It's attributable to the surgery I had from the accident I had in my neck.
Q: And the 2010 accident that you had?

A: That's the only – **the two (2); yes, sir.**"

Q: Okay. And the incident with your daughter?

A: That's on the right side –

Q: Okay. That's on the right side –

A: – that's not on the left side.

Q: – but as far as your neck pain is concerned, **you agree that all three (3) of those events contribute to your current neck pain?**

A: **With me reaching down; yes sir.**

(R. p. 323-A, lines 1-18) (emphasis added).

Later, when asked:

Q: What specific problems are you having today that are entirely attributable to your **2008 accident** and can you tell us that?

A: Yes. I'm still having a little pain in my neck every now and then and pain still shoots down through my left arm; every now and then … my fingertips will go numb, tingling.

Q: Okay. And what kind of problems are you still having today as a result of your **2010 accident**?

A: **The same.**

(R. p. 326, lines 14-23) (emphasis added).

Harrison was involved in a motor vehicle accident in July 2013. (R. p. 193, line 24 – p. 196, line 6) (R. p. 222, line 24 – p. 223, line 4). Harrison was involved in another automobile accident on March 9, 2014. Medical notes indicate that he "was restrained driver T-boned. Airbag did not deploy. Now having pain from the top of his neck to the top of his right buttocks …. Has tingling in his right hand on/off." (R. pp. 124-127). On a return visit, he again presented with "pain in neck and back from MVA. States symptoms are getting worse instead of better." (R. pp. 128-131) (R. p. 193, line 24 – p. 196, line 6).

In addition, during the summer of 2014, Harrison was involved in an altercation at work where he punched a former co-employee so hard that the other man fell to the

ground. Harrison then "got on top of him and subdued him" until the police came. (R. p. 219, line 9 – p. 221, line 25). The physical altercation lasted approximately five minutes, and Harrison held the former co-worker on the ground for an additional 15 minutes. (R. p. 220, line 22 – p. 221, line 2).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994).

It is beyond dispute that an appellate court may affirm on any ground appearing in the record. Wright v. Bi-Lo, Inc., 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994); Rule 220(c), SCACR (same). However, reviewing courts "are not at liberty to extend by construction the meaning implicit in the language found in the Workmen's Compensation Act in order to provide a more liberal rule of compensation than that

which the legislature has seen fit to adopt." Singleton v. Young Lumber Co., 236 S.C. 454, 473, 114 S.E.2d 837, 846 (1960).

ARGUMENTS

I. The Court of Appeals properly denied Harrison's claim for additional benefits based on his 2008 injury.

Despite the fact that Harrison's counsel opened oral argument before the Court of Appeals with the assertion that he knew why prior counsel had settled the 2010 claim before pursuing the 2008 claim, Harrison now insists that the Court of Appeals improperly ruled on that basis. At oral argument, Harrison's counsel explained that prior counsel had purposefully orchestrated the settlement of the 2010 injury before pursuing an award for the 2008 injury in order to avoid (circumvent) a deduction under Sections 42-9-150 to 42-9-170 of the Act. It is disingenuous at best for Harrison to now argue that the Court of Appeals should not have relied on or mentioned these sections of the Act when his own counsel raised it at oral argument.

Although Harrison repeatedly frames his first issue as whether the Court of Appeals erred in determining that Section 42-9-170 "barred" him from pursuing his 2008 claim, the Court of Appeals did not bar him from pursuing his claim but, rather, determined that he was not entitled to any additional benefits for his 2008 claim, having settled and been paid for his 2010 claim based on a lower impairment rating than he was given for his 2008 injury. Furthermore, contrary to Harrison's assertion, the Court of Appeals did not rely solely on Section 42-9-170 to determine he was not entitled to any additional benefits in this case but, instead, looked at Sections 42-9-150 to -170 and other provisions of the Act, case law from South Carolina and other jurisdictions, as well as the AMA Guides. In fact, the sole references to Section 42-9-170 are in footnote 3

discussing Harrison's counsel's argument before the Court of Appeals that the posture of this case was intentional and calculated to avoid/circumvent the credit allowed by Sections 42-9-150 to -170.

Next, Harrison fails to address the Court of Appeals' authority to decide this case on a basis not raised by either party. *See* Bartles v. Livingston, 282 S.C. 448, 465, 319 S.E.2d 707, 717 (Ct. App. 1984) ("[w]hile this Court is generally confined to the issues raised by the exceptions, it is not limited to the reasoning of the parties or the trial court in addressing those issues"); Rule 220(c), SCACR (an appellate court can rule on any basis appearing in the record). While Respondents do not concede that the basis for the Court of Appeals affirmation is the *only* basis on which the Commission should be upheld, it is clearly permissible and serves as another reason to uphold the Commission's denial of additional disability compensation to Harrison.

Harrison now argues that "the Court of Appeals misconstrued SC Code Section 42-9-170 and its application to the current factual circumstances." (Pet. p. 7). However, on rehearing, Harrison did not take issue with the Court of Appeals' interpretation of Sections 42-9-150 to 42-9-170 or their applicability to this claim. He only argued, contrary to the position he took at oral argument, that there was no intent to circumvent those sections. (Appx. pp. 17-18). Consequently, his argument that the Court of Appeals misconstrued Section 42-8-170 is unpreserved. *See* Simmons v. Berkeley Elec. Coop., Inc., 419 S.C. 223, 235, 797 S.E.2d 387, 393 (2016) (finding argument not preserved for Supreme Court review because it was not raised in a "petition for rehearing before the Court of Appeals").

Harrison's position, along with his assertion on rehearing that he merely was complying with and using Sections 42-9-150 and 42-9-170 to "recover the maximum and legally proper amount due" to him, (Appx. p. 12), requires an absurd interpretation of the Act, one that runs counter to the stated policy of our workers' compensation law. Under Harrison's interpretation, despite strong policies preventing double recovery expressed throughout the Act, *see, e.g.*, Section 42-1-450 (a claimant can recover from a subcontractor or a principle contractor, but not from both); Section 42-9-170 (as stated by Harrison, where "an employee has one or more injuries while employed with the same employer, the employer is entitled to a credit for disability compensation paid in the first claim"); Medlin v. Greenville County, 303 S.C. 484, 488-489, 401 S.E.2d 667, 669 (1991) (limiting the claimant to maximum compensation for total loss of use of the back despite subsequent injury to the back), under Harrison's theory, a claimant could recover twice for some or all of his injury by settling his second claim prior to his first claim. Such a result produces absurd results and cannot not be what the legislature intended. *See, e.g.*, Kiriakides v. UA Commc'ns, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention").

Harrison suggests that the *only* purpose underlying Section 42-9-170 is "to ensure an employer is not required to pay more than the 500 week maximum for multiple injuries when it elects to retain an injured employee." (Pet. p. 6). As noted above, Harrison cites no authority for this or any other position in his Petition. In fact, as the

Court of Appeals pointed out, if Harrison had settled or received compensation for his 2008 injury prior to resolution of the 2010 claim, Sections 42-9-150 to -170 "would have entitled Owen Steel to credit for the permanent disability benefits it would have paid for Harrison's first injury," regardless of whether the two combined injuries totaled 500 weeks or some lesser amount. A more accurate statement of those provisions of the Act, rephrasing Harrison's assertion at Pet. p. 6 is that, "[t]he statute is intended to ensure an employer is not required to pay more than" one time for any injury where an employee suffers "multiple injuries when it elects to retain an injured employee." S.C. Code Ann. § 42-9-170.

Harrison also attacks the Court of Appeals' reliance on Dr. Sweet's Form 14-B. Respondents took the position below that Dr. Sweet's rating likely accounted for impairment from both the 2008 and 2010 injuries. Respondents' Brief to the Court of Appeals argued that one of the problems with this case was that it was entirely possible "that Dr. Sweet's 15% whole body impairment rating ... also include[d] some of the impairment that is reflected in Drs. Holbrook and Johnson's 25% whole body impairment ratings." (Resp. Br. p. 19).[3]

[3] In addition, Commissioner Beck raised this very issue at the first Appellate Panel review hearing in this case, held May 18, 2015: "Well, there could be an argument that the claim sent – that he received on the second accident, on – based on a fifteen percent (15%) impairment rating, that that was inclusive of what happened in the first accident?" (May 18, 2015 Tr. p. 17, line 21 – p. 18, line 1). In response, Harrison's counsel explained, "[t]hat was one of Bo Mullis' cases and he did some things that when I got involved it takes some time to figure them out, but he did it that way so that if he settled the first accident, they couldn't deduct it from the second accident, okay? This second accident was after this impairment rating. So, they can get a deduction for prior accidents but they can't get a deduction for later accidents, okay? And that's what was going on with Mr. Mullis when he did it." (May 18, 2015 Tr. p. 18, lines 5-15). In the event this Court grants Harrison's Petition, which Respondents oppose, Respondents request that

Despite Harrison's argument to the contrary, it is not at all clear that Dr. Sweet's Form 14-B was limited to the 2010 accident. Harrison cites to no statutory, regulatory or case law authority to support his novel assertion – that, where there are two injuries to the same body part, a Form 14-B rendered after the second injury reflects *only* the degree of additional impairment caused by the second injury – for the simple reason that there is none. There is no verbiage on the form itself that so limits an impairment rating. Instead, the Form 14-B captures a claimant's impairment at the time it is rendered.

Harrison erroneously suggests the Court of Appeals held that Dr. Sweet's rating "could be interpreted" and/or "require[d] a determination" that "the condition of Claimant's spine had actually improved after the second workers compensation accident involving his spine." (Pet. pp. 8, 9). No such finding is implied or required. Instead, given the Act's prohibition against double recovery for multiple injuries to the same body part, and based on the AMA Guides recognition that a "condition may have become worse as a result of aggravation or clinical progression, or *it may have improved*," the Court of Appeals properly looked to the AMA Guides' method for apportioning successive spine impairments. It is under that methodology that the current, or later-in-time, rating is calculated and then the earlier rating is subtracted from the later rating to determine what, if any, increase in impairment a claimant has experienced.

Without any indication that he was separating out symptoms or impairment between Harrison's 2008 and 2010 accidents, Dr. Sweet provided conservative treatment only and, on November 18, 2010, released Harrison after just two appointments. On November 2, 2010, Dr. Sweet noted that Harrison's pain was "averaging 7, sharp,

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this Court allow them to supplement the Record with the transcript of May 18, 2015 Appellate Panel review hearing.

throbbing, constant. He feels he is getting worse." By November 18, 2010, however, Harrison's pain had "settled down" and he was "having only some achy neck pain without arm pain." (R. pp. 141-146).

Thus, despite Harrison's criticism that Dr. Sweet's impairment rating does not make sense in light of the change in lifting restrictions, Dr. Sweet's treatment notes indicate a clear improvement. There simply is no indication whatsoever in this Record that Dr. Sweet was limiting his impairment rating or, in fact, his comments on Harrison's condition and pain levels, to the effects of the 2010 injury as separated or apportioned out from the 2008 injury. Under the AMA Guides, if a physician is asked to apportion impairment between two sequential injuries to the same body part "the analysis must consider the nature of the impairment and its relationship to each alleged causative factor, providing an explanation of the medical basis for all conclusions and opinions." AMA Guides, p. 21. There is no such analysis or explanation in Dr. Sweet's notes or Form 14-B. In addition, in the example provided in the AMA Guides, and as noted by the Court of Appeals, in "apportioning a spine impairment, first the current spine impairment rating is calculated, and then an impairment rating from any preexisting spine problem is calculated. The value for the preexisting impairment rating can be subtracted from the present impairment rating to account for the effects of the intervening injury or disease." Id.

There is absolutely nothing in either Dr. Sweet's medical notes or his Form 14-B that suggests he performed such an analysis to arrive at his 15% impairment rating or that he even was attempting to separate out the impairment of Harrison's spine caused by the 2010 accident from that caused by the 2008 accident. (R. pp. 141-146). Harrison could

have but did not depose Dr. Sweet or even offer into evidence a questionnaire indicating any such attempt at a division or allocation of impairment. As this Court is well aware, it is a claimant's burden to present evidence and prove facts that entitle him to a workers' compensation award, which cannot be based on surmise, conjecture or speculation. *E.g.*, Crisp v. SouthCo, Inc., 401 S.C. 627, 645, 738 S.E.2d 835, 844 (2013); Packer v. Corbett Canning Co., 238 S.C. 431, 435, 120 S.E.2d 398, 400 (1961).

Harrison's argument that a Form 14-B that indicated a claimant's overall condition at the time it was rendered would be "useless," fails to acknowledge the AMA Guides process for dealing with exactly that situation. In fact, the scenario described by Harrison in his Petition for Rehearing, (Appx. p. 14) – where a claimant has a pre-existing non-work-related impairment of his spine of 15% and then suffers a work-related injury, following which a physician assigns him a 20% impairment rating – is precisely what the AMA Guides instructions address. In the scenario described by Harrison, the Commission would deduct the first impairment from the second, with a resulting 5% impairment caused by the second, work-related injury. Thus, the Form 14-B would not be "useless" but, instead, would provide the Commission with the claimant's latest impairment rating so that the additional impairment caused by work-related injury, if any, could be determined.

Harrison apparently misunderstands or intentionally misconstrues the Court of Appeals explanation of the AMA Guides' direction on apportioning loss of use or impairment between subsequent injuries to the same body part. First, the AMA Guides indicate that "[i]n some instances, the physician may be asked to apportion or distribute a permanent impairment rating between the impact of the current injury and the prior

impairment rating." AMA Guides p. 11. As noted above, there is no indication Dr. Sweet was asked to or intended to provide an apportioned rating. If he had, in order to arrive at a 15% impairment rating from just the 2010 injury, Dr. Sweet would have had to have found that Harrison's total impairment at the time of his release from treatment was 40%, which he did not.[4] There simply is no evidence that Dr. Sweet assigned Harrison a 40% overall impairment rating that, after the prior ratings were subtracted out, would have resulted in an apportioned rating of 15% for the 2010 injury.

Second, the Court of Appeals did not rule that Harrison was not entitled to additional benefits simply because he settled his second injury claim prior to the pursuing his claim based on the 2008 accident. Instead, the Court of Appeals candidly acknowledged that, "the order in which an employee settles two compensable injuries would not matter so long as the injuries are distinguishable." However, the Court of Appeals correctly ruled that Harrison "is entitled to only the compensation he received for his second injury because the 15% impairment represents the totality of his impairment resulting from his 2008 and 2010 workplace injuries" to the same body part. In other words, because Harrison settled his second injury first, and his impairment rating after the second claim was lower than the impairment ratings he had obtained in 2010, he is not entitled to any additional compensation, since subtracting the first impairment rating from the second results in a negative number or, at best, zero. In addition, the Court of Appeals held that a claimant cannot circumvent Sections 42-9-150 to 42-9-170 the Act and "our courts' express proscription against double recovery" by settling a later

[4] As the Court of Appeals noted, "the most recent permanent impairment rating is calculated, and then the prior impairment rating is calculated and deducted." AMA Guides p. 12.

claim first. That is not to say a claimant cannot settle a later claim first, but he cannot do so in order to circumvent the Act and obtain a double recovery.

Next, Harrison argues that this Court should allow him to supplement the Record with the transcript of the 2011 settlement hearing. Harrison could have but did not designate the transcript of the 2011 settlement hearing for inclusion in the Record. There is no good reason to allow him to supplement the Record at this late date, *see* Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (the appellant bears "the burden of providing a sufficient record" for appellate review), and Respondents oppose any such request.

In any event, regardless of what Harrison may or may not have believed he was settling in 2011, the Act dictates what he is and is not entitled to in terms of benefits. Furthermore, the Court of Appeals resolved this case by focusing on Dr. Sweet's impairment rating for the 2010 injury and following the AMA Guides' procedure for apportionment: "[T]he most recent permanent impairment rating is calculated, and then the prior impairment rating is calculated and deducted." The specifics of what Harrison may have believed he was settling in 2011 do not enter into or affect this analysis.

Finally, if this Court allows Harrison to supplement the Record over Respondents' objection, in all fairness it should also allow Respondents to supplement the Record with the transcript of the May 18, 2015 Appellate Panel review hearing.

II. Laches also bar Harrison's claim in this case.

The Court of Appeals correctly determined that the result reached by Commission should be upheld on grounds as explained in Section I above. However, even if this Court were inclined to review the Court of Appeals' Opinion based on Harrison's

arguments regarding the applicability of Sections 42-9-150 to -170, the Commission Decision should be upheld nonetheless. That is, contrary to Harrison's assertions otherwise, the Commission's finding that Harrison's claim is barred by the doctrine of laches is factually and legally correct, should be sustained, and provides an alternative reason to deny any further review of this case.

Despite Harrison's arguments to the contrary, the issue of laches was properly before and properly decided by the Commission. As explained more fully in Respondents' Brief, pp. 14-17, Harrison's counsel acknowledged at the February 18, 2014 oral argument before the Appellate Panel that, "**[l]aches was pled as a defense**, and it's my understanding that the order ruled against [Respondents' counsel] because it did not find for it in the Commissioner's order." (R. p. 332, lines 19-22) (emphasis added). In addition, laches was clearly pled on Respondents' 2014 Form 58, (R. p. 118), with the result that Harrison had a full and fair opportunity to respond. Thus, the issue of laches was properly before and decided by the Commission. *See* King v. Wesner, 198 S.C. 49, 62, 16 S.E.2d 289, 295 (1941) (the "niceties of pleadings and process in the law Courts" are not required in workers' compensation proceedings); *cf.* Staubes v. City of Folly Beach, 339 S.C. 406, 413-414, 529 S.E.2d 543, 546-547 (2000) (issue properly preserved for appeal where both parties treated it as having been raised, and where the defendant argued the issue at oral argument below and had ample opportunity to respond to the claim).

The Court of Appeals dismissed the Commission's finding that laches bars Harrison's recovery for his 2008 injury because "Dr. Holbrook and Dr. Johnson examined Harrison before any of his successive injuries and determined he had suffered a

25% whole-person impairment as a result of his September 2008 injury." (Opinion n.2). Respectfully, had Harrison pursued his 2008 claim in a timely manner and/or prior to the subsequent injuries to the same body part, Dr. Holbrook and Dr. Johnson's impairment ratings may have been persuasive evidence.

However, it is Harrison's condition at the time of the hearing, in this case 2014, that is determinative of any permanent disability award based on his 2008 injury. "The Commission is concerned with conditions existing prior to and *at the time of the hearing*." Keeter v. Clifton Mfg. Co., 225 S.C. 389, 394, 82 S.E.2d 520, 523 (1954) (emphasis added); *see also* Burnette v. City of Greenville, 401 S.C. 417, 424 & 429, 737 S.E.2d 200, 204 & 206-207 (Ct. App. 2012) (holding that the claimant's testimony as to her condition "at the time of the hearing" was relevant to the determination of her impairment rating); Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (Commission properly based its disability rating on medical evidence and testimony at the hearing). Questions put forth by Harrison's counsel at the August 1, 2014 hearing recognize this underlying principle. For example, Harrison was asked, "[d]o you have any injuries or physical problems *now* that you relate to this accident of September 17th of 2008?" (R. p. 192, lines 18-20) (emphasis added).

And, because a disability rating is more art than science, involving consideration of medical opinions but also opinions of vocational experts, as well as testimony by the claimant and other lay witnesses, Burnette, 401 S.C. at 429, 737 S.E.2d at 206-207; *see also* Lyles v. Quantum Chem. Co., 315 S.C. 440, 443-445, 434 S.E.2d 292, 294-295 (Ct. App. 1993) ("[t]he commission may find a degree of disability different from that suggested by expert testimony"), reliance on outdated and stale impairment ratings is

insufficient to establish a claimant's entitlement to an award. Furthermore, as explained in more detail in Respondents' Brief, pp. 17-19, where the medical evidence is outdated and stale, as is the case here, the Commission understandably and necessarily must rely on other evidence and testimony. *See* Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 499, 494 S.E.2d 630, 637 (Ct. App. 1997) (expressing concern over relying on medical evidence that was "more than two years old at the time of the hearing," and remanding so that full testimony could be elicited regarding "the impact of [the claimant's] injuries and the extent of his physical capabilities"). Thus, there is no question that basing a permanent award in 2014 on stale and superseded 2010 impairment ratings, particularly when the condition Harrison testified to at the hearing admittedly was impacted by multiple subsequent injuries to his cervical spine, (R. p. 323-A, lines 1-18; R. p. 326, lines 14-23), would be prejudicial to Respondents.

Furthermore, an award of permanency made six years after an injury, with intervening work-related and non-work-related injuries to the same body part necessarily requires speculation. It is unreasonable to ask the Commission or a reviewing court to determine "permanency" as of a point in time years before a hearing and in isolation of all that has occurred, including both work and non-work-related injuries to the same body part.

The 2010 impairment ratings provided by Drs. Holbrook and Johnson were complicated and overtaken by events that occurred between when they were rendered and the date of the hearing. As a result, and as the Commission properly found, it would require speculation to determine in 2014 what Harrison's "permanent" disability was from the 2008 accident, particularly when he had been compensated for some or all of

that alleged disability in 2011 and had suffered other non-compensable injuries to the same body part. It would be absurd to make an award for "permanent partial disability" in 2014 based on medical records and opinions rendered in 2010 that had been superseded by later injuries and treatment to the same body part. Just as an award of permanent partial disability cannot be made for conditions that might develop in the future, Keeter, 225 S.C. at 394, 82 S.E.2d at 523, a permanent award cannot be made for a point in time years prior to the hearing, particularly when subsequent injuries have occurred to the same body part. Harrison sat on his rights and attempted to "game" the Act by settling his 2010 injury first, which inevitably included compensation for some disability caused by the 2008 accident, and then attempted to double-recover by prosecuting the instant claim.

As noted above, Harrison agreed at the August 8, 2013 hearing that his "current neck pain" was the result of all three events (the September 2008 work injury, the 2010 work injury and the 2012 incident with his daughter). (R. p. 323-A, lines 1-18). Furthermore, the problems he was experiencing in 2013 from the 2008 accident were the same as the problems he was experiencing from the 2010 accident. (R. p. 326, lines 12-23). As a result, and setting aside the proper apportionment pursuant to the AMA Guides, it is impossible at this point in time to determine how much, if any, of Harrison's current permanent impairment is caused by his 2008 accident, as opposed to his 2010 work-related accident and other non-work-related injuries to the same body part.

Finally, as the Court of Appeals held, in order for a claimant "to be entitled to additional permanent partial disability compensation for a second injury, when the claimant has already received permanent partial disability compensation for a previous

injury to the same body part, the evidence must show the degree of disability attributable only to the second injury in order to avoid double compensation." This express intent to avoid double recovery for the same injury is the key to the prejudice that Respondents would suffer if this claim were allowed to go forward. Thus, despite Drs. Holbrook and Johnson providing a 25% impairment rating to the whole body in 2010, Harrison failed to pursue his claim at that time and, in fact, purposefully settled a subsequent injury to the same body part in order to circumvent the operation of Sections 42-9-150 to 42-9-170. This intent to double recover is clear evidence of prejudice to Respondents and fully supports their laches argument.

As a result, Harrison's current claim is also barred by laches, which provides an additional basis on which to uphold the Commission Decision and the Court of Appeals' Opinion.

CONCLUSION

For all the reasons stated herein, this Court should deny Harrison's Petition and request to supplement the Record. In the event this Court grants Harrison's Petition, Respondents request that they be allowed to supplement the Record with the transcript of the May 18, 2015 Appellate Panel hearing.

Respectfully submitted,

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June 15, 2018

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 5528
(Filed January 10, 2018)

Robert L. Harrison, Employee, ... Petitioner,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier, ... Respondents.

PROOF OF SERVICE

I certify that on the 15th day of June 2018, I served the **Respondents' Return in Opposition to Corrected Petition for Writ of Certiorari** on Robert L. Harrison by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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