THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
W.C.C. File No.: 0824526

Opinion No. 5528 (S.C. Ct. App. filed Jan. 10, 2018)

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S.C. SUPREME COURT

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

v.

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

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT CLAIMANT IS NOT ENTITLED TO ANY ADDITIONAL PERMANENT PARTIAL DISABILITY BENEFITS FOR HIS SEPTEMBER 17, 2008 INJURY?

STATEMENT OF THE CASE

Petitioner/Claimant Robert L. 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 Claimant 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, Claimant 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 2011, he settled the 2010 claim with Owen Steel. (R. p. 319, lines 20-23). That matter was assigned W.C.C. File No. 1013900.

Claimant filed a Form 50 dated May 8, 2013 seeking additional compensation and medical treatment for the injury to his "back, neck/cervical spine," as well as other body parts. (Form 50 dated May 8, 2013, R. pp. 298-299). Claimant sought to have this 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 Claimant's claim for further medical care and/or compensation benefits. Among other defenses, Respondents asserted that Claimant's current complaints were not related to his 2008 work-related accident and that

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[1] Owen Steel and its workers' compensation carrier at that time, Old Republic General, are referenced jointly herein as Respondents.

his claim was time barred under the Workers' Compensation Act ("Act"). (Resp. Form 51, dated May 24, 2103, R. pp. 300-301).

The parties were heard by Commissioner Avery B. Wilkerson, Jr. on July 17, 2013, who issued an opinion finding, among other things, that Claimant's current claim was time barred because it was neither 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")).

Claimant appealed the 2013 Single Commissioner Decision to the Full Commission, raising 21 separate issues, including whether Commissioner Wilkerson had erred in finding that, "as the result of a lack of diligence, Claimant did not file a claim for compensation until the filing of a Form 50, on May 8, 2013 ..." (Cl. Form 30, R. pp. 302-306).

An Appellate Panel of the Full Commission reversed the Single Commissioner on the statute of limitations issue, and specifically remanded "to the Jurisdictional Commissioner 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).

Commissioner Gene McCaskill held a hearing on August 1, 2014, and issued his decision on February 12, 2015, finding that Claimant's claim was barred by the Doctrine of Laches. He also held 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").

Claimant filed a timely Form 30, raising nine issues to the Full Commission. (Form 30, R. pp. 41-43). An Appellate Panel of the Full Commission affirmed the 2015 Single Commissioner Decision in its entirety, concluding that "Claimant has not met his burden of proving by 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 ("Commission Decision").

Claimant timely appealed to the Court of Appeals, which upheld the Commission Decision "albeit for reasons different from those underlying the Appellate Panel's decision and the parties' arguments." After finding laches did not apply in this case, the Court of Appeals also rejected Claimant's argument that "the reports of Dr. Holbrook and Dr. Johnson conclusively established he suffered a 25% whole person impairment from his September 2008 injury." (2d Corr. Appx. p. 5). The Court of Appeals explained that the unusual posture of this case was intentional on the part of Claimant's former counsel, who sought to circumvent sections 42-9-150 to -170 which would have allowed Respondents a credit had Claimant resolved his injuries in the order in which they were incurred. The Court of Appeals noted South Carolina case law that confirmed the "legislative intent to prevent double compensation." (2d Corr. Appx. p. 6).

As there is no South Carolina precedent directly on point, the Court of Appeals noted the Legislature's "intent to prevent double compensation," and noted that the AMA Guides, which are referenced by South Carolina workers' compensation law, provide a method for determining an impairment rating based on a second workplace injury to the

same body part. The Court of Appeals also looked to other states, citing Wagner v. Workers' Compensation Div., 202 W. Va. 186, 517 S.E.2d 382 (W.Va. 1998) as a case addressing apportionment between two successive workplace injuries to the same body part. The Court of Appeals ultimately concluded that Claimant was not entitled to any additional compensation because he had received compensation for his 2010 workplace injury based on a 15% impairment, which was less than the impairment ratings assigned for his 2008 workplace injury. The Court of Appeals specifically stated that it doubted "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 statute 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." (2d Corr. Appx. pp. 7-10).

After Petitioner's Petition for Rehearing was denied, (2d Corr. Appx p. 34), Petitioner sought review by this Court on the laches issue and on the Court of Appeals' determination that he was not entitled to any additional compensation for his September 17, 2008 injury. This Court accepted review of the second issue only.

FACTUAL BACKGROUND

Following Claimant's September 17, 2008 injury, he began treating with Dr. Thomas J. Holbrook. On November 10, 2009 Dr. Holbrook performed an anterior cervical discectomy with fusion and instrumentation on Claimant's cervical spine at C5-C6. (R. pp. 73-78). On July 21, 2010, and after Claimant 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 Claimant "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." (R. pp. 86, 89).

On September 29, 2010, Claimant underwent an Independent Medical Evaluation ("IME") by Dr. Donald Johnson. Dr. Johnson agreed that Claimant was at MMI, and assigned him a 25% impairment rating to the whole body. (R. pp. 90-91).

Claimant testified that, after Dr. Holbrook released him, he returned to work as a welder. (R. p. 315, lines 11-13). He agreed that he was performing his job without any accommodations. (R. p. 316, lines 5-19). Claimant testified that working as a welder required him to wear a hard hat with a shield, to bend down, and to engage in lifting up to 40 pounds. (R. p. 313, lines 8-22).

On October 4, 2010, Claimant reinjured the same body part at work. (R. p. 314, lines 15-21). Notes from the ER indicate that Claimant "felt an immediate onset of sharp pain which radiated down to his upper back and down his left arm." (R. p. 274). Claimant began treating with Dr. Raymond C. Sweet. Dr. Sweet's medical notes indicate that he was aware of Claimant's prior surgery with Dr. Holbrook. Dr. Sweet noted that Claimant was "mainly complaining of chronic achy low neck pain," and recommended against a posterior fusion, indicating that Claimant should perform light duty work. On November 18, 2010, Dr. Sweet released Claimant from his care. (R. pp. 141-145).

Dr. Sweet also filled out a Form 14B, indicating Claimant had injured his cervical spine, that he reached MMI as of November 2, 2010, and assigning a 15%

impairment rating to the whole body based on the injury to Claimant's cervical spine.[2] Dr. Sweet indicated that Claimant was able to return to work but no lift more than 30 pounds. (R. pp. 146, 283).

Claimant settled his 2010 workplace injury claim with Respondents for $42,193.63, representing a 28% loss of use of his back, or 84 weeks of permanent partial disability ("PPD"). (Form 19, dated Aug. 17, 2011, R. p. 307, and Form 16A, R. p. 121, both filed in in W.C.C. File No. 1013900). Although Claimant testified 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, Claimant injured his shoulder while lifting his daughter off the ground which caused neck and shoulder pain. Claimant testified that the pain he felt at the time of the hearing was attributable to his 2008 and 2010 workplace injuries, as well as this 2012 incident. (R. p. 317, line 21 – p. 318, line 7) (R. p. 323-A, lines 1-18) (R. p. 326, lines 14-23).

Claimant testified that, since 2012, he has worked as a shop foreman. He agreed that he is a "working supervisor" where, on occasion, he has to perform the tasks he is supervising, including "welding, turning beams, cleaning pieces up" and Gantry welding,

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[2] Claimant's Brief suggests that, in the Form 14-B, Dr. Sweet "stated" that Claimant "had sustained a fifteen (15) percent impairment as a result of the accident of October 4, 2010." (Pet. Br. p. 4). However, Dr. Sweet's Form 14-B does not link the impairment rating strictly to the 2010 accident but, instead, states as follows: "Based on the AMA Guidelines, the claimant has sustained a 15% medical impairment total body ..." (R. pp. 146, 283).

which are physically demanding tasks. (R. p. 212, line 3 – p. 214, line 8) (R. p. 230, line 11 – p. 232, line 8 (Claimant's supervisor, Terry Hartwell, testifying as to the physical nature of Claimant's job and that Claimant has never requested any changes or modifications to his job due to neck pain)). Claimant testified that, when he experiences problems with his neck, he takes over-the-counter medications such as aspirin, but does not take any prescription medications. He has not complained to his supervisor or asked for any job modifications. (R. p. 214, line 12 – p. 215, line 15).

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). "Statutory interpretation is a question of law," which appellate courts are "free to decide with no particular deference to the lower court." Consumer Advocate for S.C. v. South Carolina Dep't of Ins., 397 S.C. 599, 602, 725 S.E.2d 708, 709-710 (Ct. App. 2012).

ARGUMENTS

I. The Court of Appeals correctly held that Claimant is not entitled to any additional permanent partial disability benefits for his September 17, 2008 injury.

Although Claimant repeatedly frames the 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. Instead, the Court of Appeals determined that Claimant was not entitled to any additional benefits for his 2008 claim, having settled and been paid for his 2010 claim based on an impairment rating that was lower than the ratings he was given for his 2008 injury. Furthermore, contrary to Claimant'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 to reach its conclusion.

The sole references to Section 42-9-170 in the Opinion are in footnote 3 discussing Claimant's counsel's argument before the Court of Appeals that the posture of this case was intentional and calculated to avoid/circumvent any credit allowed by Sections 42-9-150 to -170. In fact, Claimant's counsel opened oral argument before the Court of Appeals with the assertion 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 allowing Respondents a credit under Sections 42-9-150 to 42-9-170 of the Act.

Claimant attempts to distinguish Medlin v. Greenville County, 303 S.C. 484, 401 S.E.2d 667 (1991). However, the Court of Appeals readily acknowledged that there are

no South Carolina cases directly on point. Instead, the Court of Appeals noted that Medlin was instructive in the instant case, which it is. In Medlin, although this Court ultimately decided Section 42-9-170 was not directly applicable (because the claimant in that case "was not drawing compensation for his 1983 injury at the time his second injury occurred" because he had settled his claim for the first injury on a lump sum basis), this Court extended the principle underlying that provision of the Act to deny the claimant additional compensation for his second injury to the same body part. Key to this Court's decision in Medlin, and key to the Court of Appeals' reliance on Medlin in this case, is the statement that, "[o]nly if employee had suffered less than fifty percent loss of use to his back in the first accident, would he have been entitled to compensation *for the degree of disability which would have resulted from the later accident.*" 303 S.C. at 488, 401 S.E.2d at 669 (emphasis in Court of Appeals' Opinion). The operative, and controlling concept is that a claimant is entitled only to the degree of additional disability, if any, that results from a later injury to the same body part.[3]

Claimant would limit the operation of Section 42-9-170 and, presumably, Section 42-9-150 and -160, only to "prevent a claimant from receiving total compensation in excess of 500 weeks if a second injury occurs with the same employer." (Pet. Br. p. 8). While Sections 42-9-150 to -170 do serve that purpose, they also serve to prevent a claimant from obtaining a double recovery in cases involving sequential workplace injuries, whether in the employment of the same or a subsequent employer. Section 42-9-150 provides, in pertinent part that, where an employee has a permanent disability and

[3] This Court also explained that "[t]hese principles would hold true in any case regardless of whether the successive injury occurred while working for the same or different employers." Medlin, 303 S.C. at 488, 401 S.E.2d at 669.

then suffers "a subsequent permanent injury by accident ... he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed ..." S.C. Code Ann. § 42-9-150. In other words, Sections 42-9-150 to -170 ensure that, in cases where there are sequential compensable injuries, a claimant recovers only the total amount of disability resulting from his injuries, and no more.

In Hopper v. Firestone Stores, 222 S.C. 143, 72 S.E.2d 71 (1952), this Court confirmed that "the Legislature intended that the compensation here, if there is to be such, must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto ..." 222 S.C. at 153, 72 S.E.2d at 75. This language, as the Court of Appeals correctly pointed out, "clearly evidences legislative intent to prevent double compensation." 222 S.C. at 153, 72 S.E.2d at 76.[4] In Hopper, because the claimant had had his right leg amputated above the knee following a prior motorcycle accident, he was not entitled to any compensation for any additional injury to that leg. Clearly, the facts in Hopper are not analogous to the instant case; however, this Court's exposition of the Legislature's intent is significant and should control this case.

South Carolina courts have long upheld the policy of preventing double recovery for an injury, both in workers' compensation claims and in other types of claims. *See, e.g.*, Breeden v. TCW, Inc./Tenn. Express, 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) (explaining that the "policy issues surrounding subrogation in a workers'

[4] To the extent Claimant argues that the above-quoted language is nothing more than dicta, this Court recently warned litigants that "those who disregard dictum, either in law or in life, do so at their peril." Gordon v. Lancaster, Op. No. 27847, 2018 S.C. LEXIS 134 *11 n.6 (Nov. 21, 2018).

compensation setting include imposing the burden of payment upon the actual wrongdoer, and *avoiding double recovery for the injured employee*") (emphasis added); Wise v. Wise, 394 S.C. 591, 600, 716 S.E.2d 117, 122 (Ct. App. 2011) (the underlying purpose of Section 42-1-560 "serves to protect the carrier's subrogation interests and *prevents an employee's double recovery*") (emphasis added); Collins Music Co. v. Smith, 332 S.C. 145, 146, 503 S.E.2d 481, 482 (Ct. App. 1998) ("[i]t is well settled in this state that '*there can be no double recovery for a single wrong* and a plaintiff may recover his actual damages only once") (emphasis added). That policy applies equally here.

In Wagner, the employee suffered a back injury in 1982 for which she received a permanent partial disability award of 22%. She reinjured her back in 1993 and, after "a prolonged course of treatment for her injury, two physicians assigned her a 10% impairment rating. One physician applied the AMA Guides formula, subtracting her prior impairment rating from her current impairment rating, and determined she was not entitled to any additional compensation. 202 W. Va. at 187 & n.2, 517 S.E.2d at 284 & n.2. The other doctor opined that she had recovered since her 1982 injury, had returned to work and that her earlier injury "had very little effect on the current injury." 202 W. Va. at 188, 517 S.E.2d at 285. The West Virginia Supreme Court affirmed the Commission's determination that the second physician's impairment rating was unreliable because "he failed to consider the permanent aspects of [the claimant's] 1982 injury" and appeared to assume the prior impairment had cured itself. 202 W. Va. at 190, 517 S.E.2d at 287. Instead, the Court adopted the rating provided by the first physician, agreeing that "because the 1982 and 1993 injuries occurred at the same location, the percentage of impairment that resulted from the earlier injury must be subtracted from the

current percentage of impairment in order to ascertain the amount of impairment that resulted from the later injury." 202 W. Va. at 190, 517 S.E.2d at 287. As is the case here, in Wagner, that amount was, at best, zero.

Claimant next attacks the Court of Appeals' reliance on Dr. Sweet's Form 14-B, incorrectly arguing that Respondents "did not take the position before the Commission or the Court of Appeals the Claimant's spinal condition improved as a result of the accident of October 4, 2010." (Pet. Br. p. 9). Regardless of whether Respondents took that position below, the Court of Appeals accurately pointed out that, pursuant to Rule 220(c), an "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; *see also* Bartles v. Livingston, 282 S.C. 448, 465, 319 S.E.2d 707, 717 (Ct. App. 1984) (stating an appellate court "is not limited to the *reasoning* of the parties or the trial court in addressing" the issues before it).

Despite Claimant's argument to the contrary, it is not at all clear that Dr. Sweet's Form 14-B was limited to the 2010 accident. Claimant cites to no statutory or regulatory authority or to any case law to support his novel assertion – that, where there are two sequential injuries to the same body part, a Form 14-B rendered after the second injury automatically 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. Furthermore, the Form 14-B specifically refers to the "AMA Guidelines," [sic] which the Court of Appeals found instructive. Finally, nothing in the way Dr. Sweet filled out the Form 14B in this case indicates he had

calculated or intended to reflect only the degree of additional impairment caused by the 2010 injury.

Claimant erroneously suggests the Court of Appeals held that Dr. Sweet's rating "could be interpreted" and/or "require[d] a determination the second workers compensation accident actually improved the cervical discectomy with fusion performed by Dr. Holbrook." (Pet. Br. pp. 9, 10). The Court of Appeals Opinion requires no such finding.[5] Instead, based on Dr. Sweet's unrestricted impairment rating and Dr. Sweet's finding that Claimant was much improved by the final visit, (R. pp. 141-145), it is reasonably inferable that Claimant's condition had improved by November 2010. It is not insignificant that, at the time of the hearing, Claimant's position was as a "working supervisor" where, on occasions, performs physically demanding tasks. (R. p. 212, line 3 – p. 214, line 8) (R. p. 230, line 11 – p. 232, line 8). He was taking over-the-counter medications such as aspirin, but no prescription medications. Claimant did not complain to his supervisor or ask for any job modifications. (R. p. 214, line 12 – p. 215, line 15). All of these factors point to an improved condition after the 2010 injury, regardless of a change in lifting restrictions.

Hypothetically, had Claimant pursued his claim for his 2008 injury based on the two 25% impairment ratings to the whole body that he received from Drs. Holbrook and Johnson, he may have been awarded more than the amount for which he settled his 2010

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[5] Indeed, it is not uncommon for physicians to disagree as to the degree of permanent impairment a claimant has experienced from a single injury. *E.g.*, Linen v. Ruscon Constr. Co., 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (two physicians providing two different impairment ratings, one a 15% impairment to the claimant's back and another providing a 20-30% impairment rating the back); Lail v. Georgia-Pacific Corp., 285 S.C. 234, 328 S.E.2d 911 (1985) (two physicians providing different impairment ratings to thumb and ring finger).

claim. By sitting on his 2008 claim, however, and settling his 2010 claim first for an amount representing a 28% loss of use of the back, Claimant cannot complain now that he is being treated unfairly – simply because he has not been allowed to "game" the Act so as to recover more than that to which he is entitled.

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 Claimant's 2008 and 2010 accidents, Dr. Sweet provided conservative treatment only and, on November 18, 2010, released Claimant after just two appointments. On November 2, 2010, Dr. Sweet noted that Claimant's pain was "averaging 7, sharp, throbbing, constant. He feels he is getting worse." By November 18, 2010, however, Claimant's pain had "settled down" and he was "having only some achy neck pain without arm pain." (R. pp. 141-146).

Thus, despite Claimant'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 Claimant'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. 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 Claimant's spine caused by the 2010 accident from that caused by the 2008 accident. (R. pp. 141-146). Claimant 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).

Claimant's argument that a Form 14-B that indicated a claimant's overall condition at the time it was rendered would be "useless," (Pet. Br. pp. 10), fails to

acknowledge the AMA Guides' process for dealing with exactly that situation. In fact, the scenario Claimant described 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 Claimant, 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.

Claimant 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. 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 Claimant's total impairment at the time of his release from treatment was 40%, which he did not.[6] In fact, at Claimant's last visit with Dr. Sweet, the notes indicate that his pain had "settled down" and he was "having only some achy neck pain without

[6] 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.

arm pain." (R. pp. 141-146). There simply is no evidence that Dr. Sweet assigned Claimant 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.

As noted above, the Court of Appeals did not rule that Claimant 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. In fact, 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 Claimant "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 Claimant settled his second injury first, and his impairment rating after the second claim was lower than the impairment ratings he had obtained in 2010 for the same body part, 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 -170 of the Act and "our courts' express proscription against double recovery" by settling a later 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.

Claimant now argues that "the Court of Appeals misconstrued SC Code Section 42-9-170 and its application to the current factual circumstances." (Pet. Br. p. 7). However, on rehearing, Claimant did not take issue with the Court of Appeals'

interpretation of Sections 42-9-150 to -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 42-9-170 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").

Claimant's position, along with his assertion on rehearing that he merely was complying with and using Sections 42-9-150 and -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 Claimant'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 Claimant, 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, 303 S.C. at 488-489, 401 S.E.2d at 669 (limiting the claimant to maximum compensation for total loss of use of the back despite subsequent injury to the back), a claimant could recover twice for some or all of his injury by settling his second claim prior to his first claim. Such an absurd result 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"); Consumer Advocate, 397 S.C. at 602, 725 S.E.2d at 710 (same).

CONCLUSION

For all the reasons stated herein, this Court should affirm the Court of Appeals Opinion in this case and dismiss Claimant's appeal.

Respectfully submitted,

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December 27, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
W.C.C. File No.: 0824526

Opinion No. 5528 (S.C. Ct. App. filed Jan. 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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents Owen Steel Company, Inc. and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc. complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondents complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

December 27, 2018

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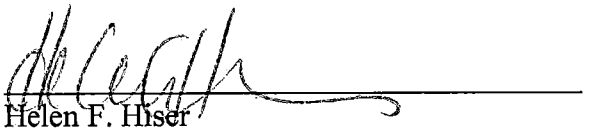

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S.C. SUPREME COURT

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PROOF OF SERVICE

I certify that on the 27th day of December 2018, I served the **Brief of Respondents** 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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