THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2019-001254
WCC File No. 1506114

Frankie Padgett, Claimant. . . . . Respondent,

v.

Cast and Crew Entertainment Services, Inc., Employer,
and American Zurich Insurance Company, Carrier, ... Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE FACTS

This is an appeal by the Employer and Carrier from the Workers' Compensation Commission following a Petition for Hearing to Terminate Compensation filed by the Appellants. The Single Commissioner granted Appellants' Petition in part and ordered compensation to immediately be terminated on June 15, 2018. The Appellate Panel reversed and reinstated Padgett's weekly compensation.

The Claimant, Frankie Padgett, is a member of the International Brotherhood of Teamsters. Padgett works as a truck driver for various movie production companies who produce movies and television shows in South Carolina.

Cast & Crew Entertainment Services, Inc., is a California-based company which provides payroll and employee benefit services (including workers' compensation) to the movie and television industry. Cast & Crew is not an actual employer of the people working on the movies. Rather, it is a *payroll service*. By using Cast & Crew's payroll services, the production companies making the programs avoid the hassle of creating a human resources and payroll department for a production which may last only a few months.

Cast & Crew is one of two companies providing this service, the other being Entertainment Partners.

Each show or movie is produced by a production company. The production company needs to hire and pay the crew (technicians, set designers, lighting, gaffers, truck drivers, caterers, hair and makeup, etc) and the actors. For truck drivers, they contact the local Teamsters Union. The Union gives them a list of names, from which they select the truck drivers. Each driver is called, offered the job, and told where to report. The driver reports to the set where he meets with the crew chief

and fills out new hire paperwork. He may not know whether his paycheck comes from Cast & Crew or Entertainment Partners until he receives the actual check.

In 2009, Padgett was hired through the Union by ABC Productions to work on a show called *Army Wives*. ABC Productions hired Cast & Crew Entertainment Services, Inc., to handle payroll and employee benefits for the duration of the production. Padgett suffered a work-related injury to his left leg during the production of *Army Wives*. Cast & Crew provided workers compensation benefits to Padgett through its contract with ABC Productions. This case ultimately settled on September 27, 2012 on a clincher for a $150,000.00 lump sum. The case settled before Padgett reached MMI or completed treatment. The clincher included James proration language but did not otherwise allocate the settlement, except to release liability for every possible claim that could have been raised. [clincher]

After the first case settled and he recovered from his left leg injury, Padgett returned to work in movies in 2013. He worked on *Reckless - Season 1*, produced by Eye Productions, Inc. (an affiliate of CBS). In 2014, he worked on *Identity - Pilot*; also produced by Eye Productions. He then worked on *South of Hell*; produced by SOH Productions, LLC. For these productions, Padgett received his paychecks made out to Frankie Padgett from Entertainment Partners. [Ex D].

In 2015, Padgett was hired through the Union by Danger Boy Productions to work on a show called *Vice Principals*. For this production, he received his paycheck from Danger Boy Productions, although it apparently was issued by Cast & Crew on behalf of Danger Boy Productions.

On May 6, 2015, Padgett suffered a work-related injury to his right leg during the production of *Vice Principals*. He tore his Achilles tendon, for which he required multiple surgeries. Cast & Crew provided workers compensation benefits to Padgett through its contract with Danger Boy

Productions.

On June 23, 2015, Appellants filed **DEFENDANT'S PETITION TO TERMINATE PAYMENT OF TEMPORARY TOTAL DISABILITY COMPENSATION AND/OR MEDICAL BENEFITS.** Appellants raised two grounds to terminate benefits in their petition.

For a first ground, Appellants alleged that the "$150,000.00 paid to Respondent in resolution of the 2009 claim represented the remaining benefits to be paid [and] The clincher reflects that a total of 375 weeks have been paid with regard to the 2009 claim." [Petition, page 2, paragraphs 4 and 5]. Claimant contested this allegation, arguing that per the Form 19 and the clincher itself, the settlement could not be attributed to any amount of compensation or number of weeks. The clincher was not limited to compensation. The terms of the clincher explicitly settled *all* potential issues:

> including but not limited to any consequences whatsoever of any injuries sustained by Claimant in the above-referenced accident of August 27, 2009, whether known or unknown, and including but not limited to any right which Claimant might otherwise have to demand employment or benefits for disability, disfigurement, bodily impairment, medical treatment, medicine or prescriptions, lost time or death, under the Act and specifically including any right which Claimant might otherwise have to demand further benefits by way of compensation or medical care under the Act because of a change in condition hereafter (which right is hereby expressly waived, released and renounced) whether or not arising out of or indirectly in any way conceivably attributable to Claimant's injury by accident as aforesaid and each and every consequence thereof, whether known or unknown. [Petition, Exhibit A, page 2].

Significantly, the parties entered into the clincher before Padgett had completed medical treatment or reached MMI. The Single Commissioner rejected this ground.

For a second ground, Appellants alleged "because Respondent provided misleading information concerning his identity, and as a result willfully violated the express terms of the clincher or settlement agreement and release that he not reapply for an employment position, he is

barred from receiving temporary total and medical benefits." [Petition, page 3, paragraphs 12]. This allegation was made over confusion concerning Padgett's name. His full name is Perry Frank Padgett, Jr. Because his father goes by Perry, Padgett goes by Frankie. Both *Perry Padgett* and *Frankie Padgett* appear in employment records, medical records and workers' compensation records throughout both cases. Although the Single Commissioner expressed concerns over the interchangeability of the two names, she ultimately rejected Appellants argument that the claim should be barred due to fraud or misrepresentation.

Instead, the Single Commissioner *sua sponte* terminated Padgett's temporary compensation on a ground not raised by Appellants nor argued at the hearing. The Single Commissioner held:

> Based upon the terms of the settlement agreement and release, Claimant was previously compensated by Cast & Crew for 1,704.56 weeks of benefits (per a mutually agreed to allocation by the parties). As such, Claimant has exceeded 500 weeks of compensation benefits pursuant to the act. Assuming *arguendo*, claimant's prior award did not exceed or reach the 500 week limitation or cap, his receipt of temporary total benefits since May 6, 2015, has resulted in payment of more than 500 weeks of compensation benefits for the same employer. [Order, page 12, Finding of Fact 8].

Padgett appealed to the Appellate Panel.

On November 13, 2017 – following the hearing but prior to issuance of the Decision and Order – Claimant filed a Motion to Submit After Discovered Evidence. Claimant sought to introduce a letter received from Cast & Crew produced by Appellants after the hearing. The letter confirms Claimant's position that:

> [Cast & Crew, Inc.] are merely a provider of payroll services to the entertainment industry and, in our limited role, we do not directly employ, or control the day-to-day responsibilities of our payroll clients nor their production employees.

The Appellate Panel heard the appeal on November 27, 2018. By Decision and Order issued

on July 3, 2019. The Panel affirmed in part and vacated in part, ordering that Appellants "shall immediately reinstatement payment of temporary total disability compensation benefits retroactively and continuing on a weekly basis until further order of the Commission." The Panel vacated the Single Commissioner's findings barring additional compensation. [FC order, page 9].

STANDARD OF REVIEW

In reviewing Workers' Compensation Commission's decision, an appellate court must affirm the Commission's factual findings if they are supported by substantial evidence and not controlled by legal error. Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999). "An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record." Tiller, 334 S.C. at 339, 513 S.E.2d at 845.

The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Miller v. State Roofing Co., 312 S.C. 452, 441 S.E.2d 323 (1994); Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991).

ARGUMENT

1. The Appellate Panel correctly held that the Employer cannot void the employee/employer relationship [in Response to Appellants' argument at pages 10-13].

Appellants contend that there is no employee/employer relationship in this case, such that the Workers' Compensation Commission lacks jurisdiction. Appellants argue that "the employment contract entered into by Respondent with Cast and Crew in 2015 prevented him from lawfully being employed by Cast & Crew." [Brief of Appellants, page 10]. Cast & Crew seeks to evade liability for an admittedly compensable work-related injury for which they filed an Agreement to Pay Compensation (Form 15) on June 8, 2015. [Form 15 6/6/15]. Two years later, on June 23, 2017, Respondents filed their petition to terminate compensation and medical treatment. [Petition 6/23/17].

Appellants predicate their argument by averring there is "no dispute" over several issues which are, in fact, disputed. Appellants state "There is no dispute that the elements necessary for the aforesaid contract to enforceable were established to form a contract . . ."[1] [Brief of Appellants, page 11]. While it is correct that the 2012 clincher resolved the 2009 workers' compensation case, Padgett absolutely disputes that the provision "that he will not seek future employment" is valid, enforceable, legal or applicable to the instant case.

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[1] Under the elements to form a contract set forth in Player, the "future employment" clause is unenforceable because (1) the Commission lacks subject matter over provisions outside the Act, including noncompete and employment releases; (2) there is no separate consideration for the "future employment" clause as the only consideration paid in the case was to resolve disputed issues under the Workers' Compensation Act; and (3) there is neither mutuality of agreement nor obligation as the provision does not prevent Cast & Crew from paying wages to Padgett on behalf of its movie production company clients. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989).

Second, Appellants state "there is no dispute Padgett was paid 1,705.56 weeks of prorated benefits . . ." [Brief of Appellants, page 12]. The parties settled the 2009 claim for a lump sum payment of $150,000.00. The Single Commissioner erroneously held "Based upon the terms of the settlement agreement and release, Claimant was previously compensated by Cast & Crew for 1,704.56 weeks of benefits (per a mutually agreed to allocation by the parties)." The Appellate Panel vacated this finding. [FC order, page 8, Finding of Fact 8]. It is inaccurate for Appellants to state there is no dispute over a finding which was vacated by the Appellate panel.

Third, Appellants mischaracterize and overstate Padgett's actions as an "obvious attempt to deceive Appellants into re-hiring him." [Brief of Appellants, page 13]. Not only is this point disputed, but both the Single Commissioner and Appellate Panel held:

> there is insufficient evidence to support a finding of fraud in the inducement or *fraud ab initio*, which would void the employee/employer relationship at the time of Claimant's injury. Claimant's use of two versions of his name, pre-injury and post-injury, while compelling, is not persuasive, absent the undersigned engaging in surmise or speculations as to fraud.

[FC Order, page 7, Finding of Fact 6].

A. As voiding the employment relationship was not appealed to the Appellate Panel, this issue is not preserved for Appellate review.

In their Petition before the Single Commissioner, Appellants sought to void the employment relationship on the grounds that Padgett's "application for employment in 2015 constituted fraud in the application, which thereby rendered void Respondent's 2015 employment tenure with [Appellants] and an obligation to pay workers' compensation benefits." [Petition, page 3, paragraph 13]. The Single Commissioner ruled against Appellants on this issue. She did find Padgett "expressly and knowingly accepted the work assignment with Cast & Crew, which violated the terms of the contract and the settlement agreement, and release." [FC Order, page 7, Finding of Fact 6].

However, she did not grant the Petition on this ground, as she also ruled "there is insufficient evidence . . . of fraud . . . which would void the employee/employer relationship . . ." [SC Order]. The Appellate Panel affirmed. [FC Order, page 7, Finding of Fact 6].

Appellants did not appeal the ruling on this issue to the Appellate Panel. As such, it is not preserved for appellate review by this Court. See Brunson v. American Koyo Bearings, 367 S.C. 161, 165-66, 623 S.E.2d 870, 872 (Ct.App. 2005)(factual findings and conclusions of law of the single commissioner become the law of the case when not challenged on appeal).

B. There is no legal basis on which Cast & Crew can void the employee/employer relationship to evade their liability under the Workers' Compensation Act.

Appellants argue they can void the employee/employer relationship (which they refer to as an "employment contract") based on language in the *Settlement Agreement and Release of All Workers' Compensation Claims* filed with the Commission on October 22, 2012. Appellants contend that voiding the employment relationship divests the Commission of subject matter jurisdiction. They specifically refer to a clause stating:

> The parties agree that the Claimant is no longer an employee of Cast & Crew Entertainment Services, Inc. And further agrees that he will not seek future employment with Cast & Crew Entertainment Services, Inc.

[Clincher 10/22/12].

The Workers' Compensation Act is a creature of statute. It is to be construed liberally consistent with its beneficent purpose. As the supreme court has stated, "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010), *quoting* Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297,

300 (1945).

With one narrow exception the claims and defenses in workers' compensation are entirely based on statute. The lone common law defense is set forth in Cooper. Cooper holds that the employer can void the employment relationship if it can prove: "(1) The employee must have knowingly and wilfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and (3) There must have been a causal connection between the false representation and the injury." Cooper v. McDevitt & Street, 260 S.C. 463, 469, 196 S.E.2d 833, 835 (1973). All three factors must be present for the employer to avoid paying benefits to the employee. Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993). Cooper is strictly limited to those situations where the putative employee *misrepresented his physical condition* to induce a potential employer to hire him knowing that he was physically incapable of doing the job without near certain risk of injury due to the preexisting condition.

Cast & Crew cannot prove the elements of Cooper. Padgett made no misrepresentations about his physical condition nor did he have a preexisting injury or impairment to his right ankle. Nor is there any possibility that use of his common name rather than his formal name has any causal connection to his ultimate injury.

Appellants seek to create new law allowing them to evade liability based on virtually any inaccurate, confusing or mistaken statement in an employee's new hire paperwork. There is no authority for this proposition. Indeed, it is contradicted by the key part of Cooper – that there must be a causal connection between the misrepresentation and the injury itself.

Appellants' argument would also violate the terms of the Workers' Compensation Act (let

alone the intent) on several grounds. Neither party has the ability to enter into a contract avoiding the Act. Appellants point to a provision in the 2012 settlement agreement wherein Padgett ostensibly "agrees that he will not seek future employment with Cast & Crew Entertainment Services, Inc." [clincher 2012]. This provision is *void ab initio* as to the Act, as the statute provides "No contract or agreement, written or implied, . . .shall in any manner operate to relieve any employer, in whole or in part, of any obligation created by this title except as otherwise expressly provided in this title." S.C. Code Ann. § 42-1-610 (2007). The Act further states "No agreement by an employee to waive his rights to compensation under this title shall be valid." S.C. Code Ann. § 42-1-620 (2007). *See, also* S.C. Code Ann. § 42-1-130 (2007)(The term "employee" means every person engaged in an employment . . . *whether lawfully or unlawfully employed* . . .)(emphasis added).

Even if such a contractual provision was not prohibited by the Act, it would be void under public policy due to the unique nature of the employment relationship in this case. While Cast & Crew may have been designated as the *de jure* employer for purposes of insurance coverage, Cast & Crew was not the *de facto* employer. The *de facto* employer was Danger Boy Productions.

Cast & Crew provides payroll services (including workers' compensation) to production companies producing movies and television programs. Padgett was injured working on *Vice Principals*. The show was produced by Danger Boy Productions, who hired Cast & Crew to be its payroll service. Padgett obtained employment with Danger Boy Productions through the Teamsters union. He did not seek nor did he obtain employment directly with Cast & Crew. His paycheck stubs

list the employer as "Danger Boys Productions, LLC (#5287)."[2] [Exhibit D].

Cast & Crew alleges Padgett was employed as a truck driver for Cast & Crew in both 2009 and 2015. In fact, Padgett was employed by ABC Productions to work on a show called *Army Wives* in 2009. When that show ended, his employment ended. In 2015, Padgett was hired through the Teamsters' Union by Danger Boy Productions to work on *Vice Principals*. The mere fact Cast & Crew was the payroll company for both productions does not make them Padgett's *actual* employer. Cast & Crew is *"merely a provider of payroll services* to the entertainment industry and, in our limited role, we do not directly employ, or control the day-to-day responsibilities of our payroll clients nor their production employees." [subpoena]. The Appellate Panel found Cast & Crew's designation as an employer is analogous to a statutory employer or Professional Employer Organization (PEO) in that these "are entities not directly controlling the daily operations of the employee, nevertheless, each entity is designated as the employer." [FC Order page 6, Finding of Fact 3].

Two companies provide payroll services to these entertainment production companies: Cast & Crew and their competitor Entertainment Services. [Tr]. If Cast & Crew could prevent a person – particularly a union member[3] – from working in any production for which it provided payroll

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[2] Appellants also introduced a "Payroll History Report." The report shows wage payments made by or on behalf of Danger Boy Productions, LLC. As this is an internal Cast & Crew report, Padgett would not have seen it. [Ex D].

[3] As Padgett is a member of the Teamster's Union hired under a collective bargaining agreement, neither Padgett nor Cast & Crew can enter into a side agreement varying the terms of the collective bargaining agreement. As the United States Supreme Court stated in J. I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944):

Individual contracts, no matter what the circumstances that justify their execution or

services, then it could effectively prohibit people from working in movies and television altogether.

The provision Cast & Crew seeks to enforce is somewhat akin to a covenant not to compete – with the distinct difference that there is no competition or economic loss to Cast & Crew, such that it lacks even the basic purpose of a noncompete agreement. Restrictive covenants not to compete are generally disfavored and will be strictly construed against the employer. "An agreement's enforceability depends on whether it (1) is necessary for the protection of the legitimate interest of the employer, (2) is reasonably limited in its operation with respect to time and place, (3) is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood, (4) is reasonable from the standpoint of sound public policy, and (5) is supported by a valuable consideration." Rental Uniform Service of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983). The provision in the instant case fails on all counts.

Padgett settled a workers' compensation claim with Cast & Crew; not a wrongful termination or other employment claim. The mere fact someone got injured on the job is not a valid reason to prohibit that person from continuing employment in an industry in which only two companies provide payroll services. Indeed, our State's public policy expressly disfavors forcing injured workers to give up their right to continuing employment as a condition of settling a workers' compensation case. " For sound policy reasons, the workers' compensation system encourages an injured employee who is still able to perform light-duty work to continue working for his current employer until he reaches maximum medical improvement and then, if possible, to return to his

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> what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement.

previous position." Lee v. Bondex, 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013).

Furthermore, the Workers' Compensation Commission is a "forum of limited jurisdiction." Crosby v. Prysmian Commc'ns Cables, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012)(Williams, J., concurring in part and dissenting in part). It has no authority to adjudicate or approve settlements of employment claims, including the restrictions on employment sought to be enforced here. "The rights and liabilities of employee and employer under the Workmen's Compensation Act are purely statutory and are to be judged by the terms of the Act. Policy considerations as to what benefits should be conferred or obligations imposed are strictly for the legislature. . . ." Blue Cross and Blue Shield v. South Carolina Indus. Commission, 262 S.E.2d 35, 274 S.C. 204 (1980)(holding health insurer had not standing before the commission), *quoting* Owens v. Herndon, 252 S.C. 166, 165 S.E.2d 696 (1969).

The Court should find as a matter of law that the contractual provision is *void ab initio* as it (1) violates the express provisions of the Act; (2) violates public policy; (3) is not within the Commission's subject matter jurisdiction; and (4) has no support in the common law. Therefore, the Commission's Decision and Order should be affirmed with modifications.

C. Cast and Crew cannot prove that Padgett committed fraud.

Appellants argue that "Padgett's actions are tantamount to a breach of contract accompanied by fraudulent act because of his obvious intent to deceive Appellants into re-hiring him." [Brief of Appellants, page 13]. The Appellate Panel rejected this argument, holding "there is insufficient evidence to support a finding of fraud . . . absent the undersigned engaging in surmise or speculations as to fraud." [FC Order, page 7, Finding of Fact 6].

To establish a cause of action for fraud, the following elements must be proven by clear,

cogent, and convincing evidence: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980); Schnellmann v. Roettger, 373 S.C. 379, 645 S.E.2d 239 (2007). The Appellate Panel correctly found Cast & Crew cannot prove fraud.

The allegation underlying Cast & Crew's fraud defense is that "Padgett's use of a variation of his legal name on the withholding from and other documents clearly show an intent to avoid discovery of his true identity by a calculated misrepresentation of his name." [Brief of Appellants, page 12].

Padgett never sought future employment with Cast & Crew. He sought employment with Danger Boy Productions. He learned he would be paid through Cast & Crew *after* he had been hired by Danger Boy Productions.[4] Padgett filled out three payroll forms in 2015. A Form W4 lists Cast & Crew as the employer – which would be Padgett's first notice that Cast & Crew was the payroll service. Conversely, the I-9 lists Danger Boy Productions as the employer.[5] The third form is an application for membership in the local Teamster's chapter with no mention of the employer.

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[4]The provision in the 2012 settlement agreement merely states: "And [Claimant] further agrees that he will not seek future employment with Cast & Crew Entertainment Services, Inc." [Clincher 10/22/12]. It does not prohibit a production company from "hiring" Padgett nor does it prohibit Padgett from accepting wages paid through Cast & Crew.

[5]The I-9 is a federal form used to insure that the employee is a citizen, legal resident or alien permitted to work in the United States. The Form I-9 must be *signed by the employer* attesting "to the best of my knowledge the employee is authorized to work in the United States." The I-9 was signed by a representative of Danger Boy Productions; not Cast & Crew. [i-9].

[Defendants Exhibit F]. The W4 is the one document that mentions Cast & Crew – which makes sense since Cast & Crew is the payroll service; not the employer. Everything else, including Padgett's paychecks, designates Danger Boys Productions as the employer. [Exhibit D].

As to the allegation that he previously used a different name, Cast & Crew never introduced any employment or payroll records from the 2009 job on *Army Wives* with ABC Production. We don't know what name was used on the new hire paperwork in 2009 because the employment documents were not produced. Cast & Crew could not produce them because they were not the employer. [subpoena]. We do know the name Frankie Padgett is used on paycheck stubs for *Reckless* (2013), *Identity* (2014) and *South of Hell* (2014). [Defendants exhibit D]. All three of these productions predated *Vice Principals* – demonstrating that Padgett did not change his name in 2015 to induce Cast & Crew to hire him.

Padgett was hired to work on *Vice Principals* on March 30, 2015. He was injured on May 6, 2015. His claim was accepted with medical treatment and temporary compensation provided from that date. More than *two years later* on June 23, 2017, Cast & Crew filed their Petition. Cast and Crew claim they had no idea that "Perry Padgett", "Frankie Padgett", and "Perry F. Padgett, Jr.", are the same person.

It is simply not plausible that Case & Crew could ever have been confused about Padgett's identity. He used the same last name, social security number, date of birth and address on all documents. Both claims were administered by the same adjuster: Vivian Hardin. Ms. Hardin signed the settlement documents for the 2009 claim. [Form 19]. And Ms. Hardin instructed the Nurse Case Manager to close the claim in July 2017. [APA page 76]. As the Employer's Representative, Ms. Hardin cannot claim "ignorance of [the alleged] falsity" of Padgett's use of his informal name. S.C.

Code Reg. 67-202 A (7)(2007)(defining "Employer's Representative as the "employer's insurance carrier . . ."

Cast & Crew cannot prove the elements of fraud. The finding of the Appellate Panel that fraud was not proven should be affirmed.

2. As Padgett was not paid more than 500 weeks, the Commission properly exercised its authority in finding Cast & Crew had no legal basis to suspend or terminate compensation [in Response to Appellants' argument at pages 14-17].

At trial, Appellants argued that Padgett had been paid more than 500 weeks, such that he had exhausted his right to additional compensation. Appellants argued that the lump sum clincher payment represented 220.14793 weeks of compensation. They made this argument without any actual evidence that this was the case. Instead, they argued that dividing the $150,000.00 lump sum payment by the compensation rate of $681.36 is equivalent to 220.14793 weeks.

The Single Commissioner rejected this argument. Instead, she *sua sponte* concluded that the allocation of the settlement over Padgett's lifetime meant he had been paid 1,704.56 weeks of compensation.[6] The Appellate Panel properly vacated this finding. [FC Order, page 8, Finding of Fact 8]. Appellants did not appeal, reverting back to the original argument they made before the Single Commissioner. Even though this argument was not appealed to the Appellate Panel,

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[6]The 2012 settlement prorated the net lump sum payment (after attorney's fees and costs) over Padgett's statutory life expectancy. [Clincher, pages 1-2]. This type of allocation is done solely to preserve the injured worker's social security disability benefits. It has no effect on the employer's liability.

The issue of whether "the Commission has the authority to include language in the order prorating the lump sum award over [a claimant's] life expectancy" was addressed by our Supreme Court in James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010). In James, the court defined the allocation as "simply a mathematical calculation;" and merely an *accounting method.* The court explained: "Proration of the lump sum award does not affect the *amount* of the award in any manner." Id.

Appellants treat it as if there is no dispute over its legal significance. Appellants write (at Part I of their brief): "there is no dispute that Padgett was paid 1,705.56 weeks of prorated benefits over his life or 220.14793 weeks over the 500 week monetary limitation ($150,000.00 divided by a compensation rate of $681.36)." [Brief of Appellants, page 12]. To the contrary, this statement is absolutely in dispute as both parts were vacated by the Appellate Panel and are inaccurate to boot.

A. Padgett has not been paid 535.14793 weeks of compensation.

Appellants contend Padgett has been paid a total of 535.14793 weeks. They are wrong.

The parties settled the 2009 claim for a lump sum payment of $150,000.00. They settled before Padgett completed his medical treatment or reached MMI. This fact is hugely significant because *the lump sum was not a disability award.* Cf. Lemon v. Mt. Pleasant Waterworks, 429 S.C. 59 n. 8, 837 S.E.2d 738 (Ct. App. 2019)("The 199-week offset is also troubling because neither the Single Commissioner nor the Appellate Panel undertook any analysis of the four prior claims to determine whether the injuries for which they awarded the 199-week credit were in any way related to the current claim . . .").

Workers' compensation claims can be resolved in three ways. They can settle for a specific number of weeks on a Form 16. A settlement on a Form 16 has the same provisions as a permanent partial disability award after a hearing. The award is based on a *percent of disability x value of the body part x compensation rate.*[7] Both the hearing award and Form 16 award provide for ongoing post-MMI medical treatment and allow one year to file for a change of condition. S.C. Code Ann.

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[7]For example, assume a claimant has a permanent injury to his arm. He has a medical impairment of 10%. The Commission generally increases impairment ratings to reflect disability or loss of use, so a possible award might be 15%. The arm has a value of 220 weeks. S.C. Code Ann. § 42-9-30 (13)(2007). Assume the compensation rate is $400.00. The award would be 15% x 220 weeks x $400.00 = $13,200.00.

42-15-60 (2007)(medical treatment); S.C. Code Ann. 42-17-90 (2007)(change of condition).

A full and final settlement (colloquially called a "clincher") is different. There is no specific disability award; no provision for ongoing medical treatment; and no ability to reopen on change of condition. The employer simply pays a sum of money to end all liability for the particular case in much the same way as civil cases are settled. See S.C. Code Ann. 42-9-390 (2007)("Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title.").

The clincher in this case explicitly settled *all* potential issues arising under the Act:

> including but not limited to any consequences whatsoever of any injuries sustained by Claimant in the above-referenced accident of August 27, 2009, whether known or unknown, and including but not limited to any right which Claimant might otherwise have to demand employment or benefits for disability, disfigurement, bodily impairment, medical treatment, medicine or prescriptions, lost time or death, under the Act and specifically including any right which Claimant might otherwise have to demand further benefits by way of compensation or medical care under the Act because of a change in condition hereafter (which right is hereby expressly waived, released and renounced) whether or not arising out of or indirectly in any way conceivably attributable to Claimant's injury by accident as aforesaid and each and every consequence thereof, whether known or unknown.

[Petition, Exhibit A, page 2].

This is a critical distinction as the parties elected to settle the 2009 claim on a clincher rather than an award. It benefitted both parties because it allowed them to settle all ongoing and future issues for a single lump sum. A clincher was necessary because Padgett would not have been entitled to an award for permanent partial disability as he had not reached MMI and had no permanent impairment rating.

Further proof that the settlement did not represent a specific number of weeks is shown on

the Form 19. The Form 19 shows Padgett was paid 154.857 weeks of TTD. There is no number of weeks listed for "P.P." (permanent partial disability) nor for the Agreement and Final Release. The fact there is no space to allocate any number of weeks for the Agreement and Final Release shows the Commission and legislative intent that a clincher should remain unallocated. This procedure fosters settlement of an entire claim, thus permitting carriers and employers to fix their liability at a set amount with finality. [19].

The Appellate Panel properly vacated the findings of the Single Commissioner that the clincher represented a specific number of weeks. This finding is legally correct and supported by substantial evidence. The order below should be affirmed.

B. Cast & Crew is not entitled to credit for any payments made in the 2009 claim involving *Army Wives*.

The Commission properly held Cast & Crew cannot claim credit for the 154.857 weeks of temporary total disability paid in the 2009 claim. The case law does not allow credit to be taken for the previous claim because (1) Padgett was only paid TTD; and (2) there is no evidence of a definable permanent injury for which Padgett received an award. As to TTD, under Section 42-9-150,

> an employer would only be entitled to credit for previous awards of workers' compensation benefits involving permanent disability. There is no evidence of record, however, that [claimant] ever sustained a previous permanent injury or received any permanent benefits for such an injury. The only evidence of any prior workers' compensation benefits received by [claimant] were temporary total benefits paid by [employer]. . . . Accordingly, this statute is inapplicable to the present situation. Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003).

Eaddy is exactly on point. Accordingly, Appellants cannot claim credit for previous TTD payments nor can they claim credit for payments made to clincher the entire previous case.

Furthermore, because Padgett did not receive a disability award under § 42-9-30 or § 42-9-10(B), the 2009 case has no bearing whatsoever on the 2015 case. See Lemon v. Mt. Pleasant Waterworks, 429 S.C. 59, 837 S.E.2d 738 (Ct. App. 2019)("Appellate Panel erred in applying § 42-9-170 to credit [employer] with 199 weeks of compensation paid for Claimant's prior benefits").

Therefore, the Court should affirm the Appellate Panel's holding that Cast & Crew is not entitled to a credit for either temporary total or the lump sum clincher payment made in the 2009 case against the 2015 case.

3. The Appellate Panel did not abuse its discretion in reinstating Padgett's temporary compensation and holding he was not barred from receiving additional compensation [in Response to Appellants' argument at pages 17-18].

Appellants contend Padgett has received 535 weeks of compensation, such that he is barred from receiving additional compensation by § 42-9-170. [Brief of Appellants, page 17]. As noted earlier in this brief, Padgett was not paid any compensation for previous permanent disability. Regardless, Appellants' description of § 42-9-170 is not accurate.

A form of § 42-9-170 has been part of the Act since it was passed in 1936 concurrent with the establishment of the Second Injury Fund. The purpose of the Fund was to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995).

The Second Injury Fund was financed by a premium tax on all insurance carriers, self-insurers and the State Accident Fund. S.C. Code Ann. § 42-7-310 (2007). The monies in the Fund were used to reimburse these insurers when an employee's disability was amplified because of a pre-

existing medical condition. The insurer would be reimbursed for additional compensation and medical treatment paid past the first 78 weeks. S.C. Code Ann. § 42-9-400 (2007). To claim reimbursement, the insurer must have shown that the employer knew or learned of a previous permanent physical impairment. Id.

Section 42-9-170 complemented the Second Injury Fund. It provided "that the employee may receive further benefits as provided by Sections 42-7-310, 42-9-400, and 42-9-410 if his subsequent injury qualifies for additional benefits provided in those sections." S.C. Code Ann. § 42-9-170 (A) (2007). This statute was a benefit to an employee as it allowed him to receive up to 500 weeks for a new claim even if he had previously been awarded compensation for a permanent injury in an earlier claim. It also benefitted the employer because the cost over the initial 78 weeks was paid entirely by the Fund.

The Fund was legislatively eliminated by the amendments to the 2007 Act. The spur to the amendment was the Supreme Court's 2006 opinion in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). Ellison held that if the "combined effects" of a preexisting condition and a new compensable injury resulted in greater disability than the injury itself, the employee was entitled to compensation for permanent total disability. Ellison created an exception to the "two-body-part" rule set out in Singleton "[w]here the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960).

The reaction to Ellison was swift. The Legislature amended § 42-9-170 and enacted a new statute (§ 42-9-35) to eliminate the "combined effects" exception to Singleton. It also amended §

42-9-400 to prospectively eliminate the Second Injury Fund.

The sentence permitting an employee to "receive further benefits . . . if his subsequent injury qualifies for additional benefits provided in [the Second Injury Fund]" was changed to preserve the right to additional compensation despite the elimination of the Fund. The new sentence provides:

> If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, *except that the employee may receive further benefits as provided under the provisions of Section 42-9-35.*

S.C. Code Ann. § 42-9-170(B) (2007)(emphasis added).

The amended statute reaffirmed the employee's right to receive "additional compensation." To fully understand this, one must go back to Ellison. Ellison held the original statute:

> indicates the legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body part if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition.

Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

The concern with Ellison was that the preexisting condition need not have been aggravated by the work injury. Ellison had numerous "pre-existing physical conditions including hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease which, in combination with his workplace injury, rendered him physically unable to return to work after his accident." Id. None of these conditions aggravated or were aggravated by his work-related leg injury.

Section 42-9-35 legislatively overruled the combined effects holding by requiring the employee to prove that: "(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or (2) the preexisting condition or the permanent physical impairment

aggravates the subsequent injury." S.C. Code Ann. § 42-9-35 (A)(2007). The statute preserved the Commission's authority to

> award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and who incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury.

S.C. Code Ann. § 42-9-35 (B)(2007).

The additional compensation was not limited to a scheduled member award if "the subsequent injury [impaired] or affect[ed] another body part or system . . ." Id.

In Ellison, the Supreme Court overruled this Court's opinion because it "reasoned that § 42-9-400 was not applicable because it merely entitles an employer's insurance carrier to be reimbursed by the Second Injury Fund." Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). The Ellison court stated: " Providing for an employer's reimbursement from the Fund for the 'combined effects' of a workplace injury and pre-existing conditions would be futile unless a claimant could actually make such a recovery in the first place. We presume the legislature intends to accomplish something by its enactments and that it would not do a futile thing. " Id.

The same reasoning applies to the Legislature's retention of an employee's right to "receive further benefits" notwithstanding a preexisting impairment. The requirements may be different with the elimination of the combined effects doctrine, but so long as the employee proves the aggravation, he is entitled to as much as the full 500 weeks for the subsequent injury.

The Legislature balanced the interests of insurers and employees by eliminating the Second Injury Fund and the combined effects doctrine, yet retaining the ability of the employee to receive further benefits. If the employee could not receive these benefits, then the retention of the "receive

further benefits" language would be would be "futile unless a claimant could actually make such a recovery in the first place." Id.

For these reasons, Cast & Crew's analysis of § 42-9-170. The Commission did not abuse its discretion in allowing additional compensation.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be affirmed with modifications.

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Columbia, South Carolina
May 4, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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May 04 2020
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-001254

Frankie Padgett.....Claimant/Respondent,

v.

Cast & Crew Entertainment Services, Inc. and American Zurich Insurance Company c/o Zurich North America.....Carrier/Appellants.

PROOF OF SERVICE

I certify that I, Wanda Powell, paralegal for the Samuels Reynolds Law Firm, LLC, have served the **Initial Brief of Respondent, Designation of Matter** and **Respondent's Return to Motion to Perfect Appeal** upon counsel for the Appellants via electronic service on May 4, 2020 addressed as follows:

Vernon Dunbar, Esquire
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May 4, 2020

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May 4, 2020

Via email: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Frankie Padgett v. Cast & Crew Entertainment Services, Inc. and American Zurich Insurance Company c/o Zurich North America
Appellate Case No. 2019-001254

Dear Ms. Kitchings:

Attached for filing please find the **Initial Brief of Respondent, Designation of Matter, Respondent's Return to Motion to Perfect Appeal** and **Proof of Service** in the above case.

By copy of this letter, I am hereby serving Vernon F. Dunbar, counsel for the Appellants, of same.

Respectfully,

Stephen B. Samuels

Attachment(s) as stated
cc: Vernon F. Dunbar, Esquire (Via email: vernon.dunbar@mgclaw.com)

SBS/wp