THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001764

Op. No. 5726 (S.C. Ct. App, filed May 13, 2020) (Shearouse Adv. Sh. No. 19 at 75)

Chisolm Frampton, Employee, ... Appellant,

v.

S.C. Department of Natural Resources, Employer,
and S.C. State Accident Fund, Carrier, ... Respondents.

PETITION FOR REHEARING

Appellant, by and through his undersigned attorneys, hereby files this Petition for Rehearing. On February 14, 2018, this Court issued an opinion affirming in part, reversing in part, and remanding the Decision and Order of the South Carolina Workers' Compensation Commission. Frampton v. S.C. Department of Natural Resources, Op. No. 5726 (S.C. Ct. App, filed May 13, 2020) (Shearouse Adv. Sh. No. 19 at 75).

As grounds for granting his Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence, law and arguments raised on the issues of: (1) whether the law of the case was erroneously applied because there was no reason for Frampton to appeal the Single Commissioner's ruling as to section 42-9-35 because he prevailed on the issue; (2)

whether Frampton was required to prove the elements of section 42-9-35 when compensability of the claim was admitted in the pleadings and section 42-9-35 was not raised at trial; (3) whether the Commission improperly applied section 42-9-35; and (4) whether the Single Commissioner's 20% disability award is legally correct.

ARGUMENT

1. As a prevailing party is not required to appeal to preserve an issue, the law of the case doctrine does not apply to this case.

Appellant respectfully requests the majority to adopt the dissenting opinion of Chief Judge Lockemy wherein he concludes "the appellate panel misapplied the law of the case doctrine" to bar compensation for permanent disability based on the Appellate Panel's conclusion that Appellant failed to satisfy his burden of proof under section 42-9-35. Appellant believes the Court may have misapprehended the application of the law of the case doctrine to create a trap for an unwary party. See Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) (holding civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party).

Appellant acknowledges the general rule that an unappealed ruling, right or wrong, is the law of the case. However, the general rule should yield to some degree of common sense when a party prevails at trial. As the dissent notes, "notwithstanding the single commissioner determined Frampton failed to meet his burden of proof pursuant to 42-9-35, she ruled in his favor on this issue, finding DNR admitted the claim." Frampton was the prevailing party on this issue at trial. There was no reason for him to appeal.

Frampton's cross-appeal to the Appellate Panel was limited to the single commissioner's

legal error in limiting his disability award to 20% to the back. He raised no issues about the underlying acceptance and compensability of his claim because he won the trial on that issue. Cf. Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990)(the definition of prevailing party " clearly envisions a victory to some degree on the merits.").

If Frampton had been satisfied with the disability award, he would not have appealed at all. Ironically, this would have put him in a better position as without an appeal on his part neither the Commission nor the Court could have applied the law of the case rule – which necessarily applies only to appellants.

It would be inefficient and pointless to require a prevailing party to appeal incidental findings which have no bearing on the ultimate result. Such a rule would require every party to a workers' compensation case to appeal every negative finding of fact and every conclusion of law made by the single commissioner – even if the party prevailed on the ultimate issue.

This goes against established law where respondents are treated differently than appellants when it comes to issue preservation. In I'ON, our Supreme Court addressed the concept of additional sustaining grounds at length. Historically, it was "not necessary for the party who prevailed below to object to or appeal from the trial court's ruling in order to raise such grounds." I'ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). When the appellate court rules were adopted, the court "intended to abandon restrictions surrounding additional sustaining grounds and allow a more flexible process." Id. "Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . In contrast, different preservation rules apply to an appellant—the losing

party in the lower court." Id. The court emphasized that the appellate court has discretion to review a respondents' additional reasons and may affirm when it is "proper and fair to do so." Id.

The supreme court engaged in this analysis to clarify the law on appellate procedure. The court did so because several decisions "had resurrected the pre-1990 principles by refusing to consider an additional sustaining ground because the party who prevailed below had not both presented the argument and obtained a ruling on it from the trial judge." Id. The court recognized "[i]t would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id.

In the instant case, Appellant did raise an additional ground, to wit, the fact that the single commissioner ruled section 42-9-35 did not apply because the Respondents "admitted the claim and provided medical treatment." [R. P. 7, Finding of Fact 7]. The Appellate Panel reversed this finding *making new findings of fact and wholly new conclusions of law applying section 42-9-35 to bar the entire claim.*[1] [R. P. 29-30, Conclusion of Law 1-2]. Once the Appellate Panel made a new ruling on the applicability of section 42-9-35, the issue morphed from incidental inconsequential dicta to the dispositive ruling in the case. To hold that this new ruling cannot be challenged on appeal is neither proper nor fair.

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[1] These new findings were made by the Appellate Panel itself. As such, they are new findings and conclusions, which by definition cannot be the law of the case. Although the Appellate Panel technically sits in an appellate capacity, it makes its own findings of fact and conclusions of law. See Muir v. CR Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999)("Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law."). The Appellate Panel did not simply adopt the single commissioner's findings – as is common when the Appellate Panel affirms. It made its own rulings which necessarily can addressed by this Court on appeal.

2. The Court overlooked or misapprehended the law in failing to hold that the Appellate Panel erred in misapplying Section 42-9-35 to bar permanent partial disability compensation in an admitted case.

Appellant respectfully requests the Court to reconsider the import of the fact that, as the single commissioner found, Respondents "admitted the claim and provided medical treatment." [R. P. 7, Finding of Fact 7]. Appellant believes the Court may have overlooked or misapprehended the legal significance of an employer accepting a claim in a workers' compensation case, as well as overlooking the issues engendered by the procedure and interpretation of section 42-9-35 in this case.

A. Respondents accepted the claim and admitted it was compensable in their Form 51 and Prehearing Brief.

Workers' compensation cases are distinctly different from civil cases. The fundamental principle underlying our workers' compensation system is that "such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results." Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). In recognition of this public policy, the Legislature enacted a complete reticulated statute governing all aspects of compensation for work-related injuries. The Workers Compensation Act creates mutual obligations and benefits for both employee and employer, but at its core is the assurance that injured workers with meritorious claims will receive medical benefits and regular weekly compensation with no unexpected or unwarranted interruption. See Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 69-70, 267 S.E.2d 524, 526 (1980) (stating our workers' compensation laws reflect a societal recognition to provide "swift and sure" compensation for injuries arising out of and in the course of employment).

Workers' compensation cases progress along a continuum. If the claim is accepted, medial

treatment is provided and temporary total disability compensation is paid. Once the injured worker reaches MMI, compensation is provided either as permanent total or partial disability (economic model) or as a percentage of disability to a scheduled member (medical model). See Curiel v. Envtl. Mgmt. Servs. (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007).

This normal progression occurred in the instant case. Although initially denied, DNR and the State Accident Fund ultimately accepted liability for the claim. Once accepted, the Fund provided medical treatment, including the surgery performed by the authorized treating physician Dr. Bailey on March 21, 2011.[2] [R.P. 22, lines 6-8]. Frampton was out of work for six weeks following the surgery. He was paid salary in lieu of compensation for this period.[3]

Dr. Bailey placed Frampton at maximum medical improvement on April 17, 2013. As the next step in determining his permanent disability compensation, the Claims Adjuster for the Fund, Lindsay Sadler requested he complete a Form 14B. Dr. Bailey did so on September 20, 2013. [R. P. 178]. At some later point, Dr. Bailey amended his Form 14B to correct the impairment rating to

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[2]Appellant has filed a motion to supplement the record pursuant to Rule 212(b)), SCACR. The motion seeks to supplement the record with a Form 17 and Form 18's filed with the Commission by Respondents. Should the motion be granted, the Form 18 shows that as of March 3, 2015, the employer had paid $25,413.07 for medical treatment. This amount plainly includes Dr. Bailey's surgery, thus confirming the inaccuracy of Respondent's statement at trial that "his cervical fusion surgery, which, again, was paid for under his Blue Cross Blue Shield health benefits . . ." [R. P. 9, line 25-page 10, line 1]. The Form 17 shows Respondents required Frampton to sign a form 17 acknowledging that he had received temporary compensation from March 21, 2011 through May 1, 2011. The Form 17 states "I GIVE UP NO RIGHTS TO COMPENSATION FOR FUTURE DISABILITY, FOR PERMANENT DISABILITY, DISFIGUREMENT, OR MEDICAL CARE."

[3]State employees are required to elect whether they wish to be compensated for lost time by using their paid leave, workers' compensation benefits, or a combination of both. S.C. Code § 8-11-45 (2007). Frampton testified he used his sick leave. [R. P. 21, line 22-page 23, line 2].

conform with the AMA Guides. The corrected rating was 26% whole person. This prompted the claims adjuster to write Dr. Bailey confirming that he had intended to provide a different impairment rating and to request both a regional cervical rating and a whole person rating. Dr. Bailey responded by converting the whole person 26% impairment rating to 78% to the whole person.[4] [R. P. 183-184].

At this point, the case was now ripe for a determination of permanent partial disability. After an unsuccessful mediation, the parties prepared for a hearing. Frampton filed his Form 50 on November 17, 2014. DNR filed its Form 51 on December 4, 2014.

In their Form 51 (Employer's Answer to Request for Hearing), Respondents stated "The Defendants admit an injury to the cervical spine only; however, extent of injury and all other body parts denied. The Defendants deny an injury to the right arm." [R. P. 32]. As to permanent disability compensation, the Form included the boilerplate notation "Disability, if any, to be determined by the W.C.C." Although Respondents contested future medical treatment based on an allegation of an intervening accident, at no time did they ever deny the claim nor give any indication that it was not accepted as a compensable claim. This admission was binding on Respondents and prohibited the Commission from considering any challenge to the proof of the underlying claim. This is because "[w]here the board or commission under its authority to make rules requires an employer denying liability to file a denial in writing, specifying the facts and circumstances on which he relies as a defense, grounds of defense not so specified cannot be considered." Chapman v.

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[4]In Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017), the Supreme Court specified that the Commission must base partial disability awards to the back using regional impairment ratings from the 5th edition of the AMA Guides. Dr. Bailey's corrected impairment rating followed the AMA Guides to Permanent Impairment (5th Edition), page 392.

Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967), *quoting* 100 C.J.S. Workmen's Compensation § 500, p. 444. See, also, S.C. Code Ann. § 42-1-705 (2007)("The commission's Employer's Answer to Request for Hearing form, hereinafter referred to as Form 51, must describe with as much specificity as possible the defenses to be relied upon by the defendants.").

As the hearing approached, the parties filed their pre-hearing briefs. Frampton listed a single fact in controversy: "The degree of disability and loss of use of the neck (back) and both arms . . ." The single legal issue involved was the scheduled member statute: §42-9-30. [R. P. 33].

On July 3, 2015 – twelve days before the hearing – Respondents filed their prehearing brief. The brief contests the *extent* of Frampton's disability and whether future medical treatment is barred by an intervening accident. At no point do Respondents ever put Frampton (or the commissioner) on notice that they intend to raise any defense or failure of proof concerning the underlying injury. They never deny the claim in their pleadings and filings. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise."). Nor did they move to amend their Form 51. S.C. Code Ann. § Reg 67-610 (2007 ("After a Request for Hearing and Answer are filed with the Commission, an 'Amended' form must be filed to indicate a change in the nature of the claim, relief requested, or another defense."). This is important because both the appellate panel and the Court misapprehend the meaning of an *accepted claim.*

The Court cites Dozier for the proposition that "DNR's initial provision of treatment for Frampton's injury does not estop it from later contesting liability under these circumstances." See Dozier v. Am. Red Cross, 411 S.C. 274, 768 S.E.2d 222 (Ct. App. 2014). In Dozier, the employer admitted Dozier had injured her right and left arms (akin to Respondents' admission that Frampton

injured his cervical spine). The case was tried on two issues: (1) extent of disability with Dozier's employer denying she was permanently and totally disabled; and (2) whether she suffered from RSD/CRPS as a result of her injury. Dozier's employer prevailed on the disability award, as the commission determined she was not totally disabled, instead awarding her 20% permanent partial disability to each arm. Even though Dozier's employer contested the *degree* of disability – not the *existence* of disabililty – at no point did anyone conceive that the case could be wholly denied at that point in the proceedings.

Dozier unsuccessfully argued that because the employer had provided treatment for RSD/CRPS for a time, they were estopped them from later denying that condition. Dozier differs from the instant case because her employer consistently and openly denied the RSD/CRPS at every stage in the case. Knowing she had to prove the RSD/CRPS was related to her injury at trial, Dozier presented multiple medical opinions on the issue. Her employer presented contrary evidence. Unlike the case sub judice, Dozier's employer put her and the Commissioner on notice that the issue was to be litigated at trial.

Frampton is not arguing that the mere "initial provision of treatment" prevents an employer from later denying a claim. An employer could provide an emergency room visit or other limited initial treatment only to later deny the claim upon a good faith investigation. So long as the denial is made within the first 150 days, it is considered timely.

Respectfully, the Court is mistaken in presuming that DNR only provided a brief period of "initial treatment" before denying the claim (and of course DNR never denied the claim in any aspect until the actual hearing nearly five years after the accident). In this case, DNR provided much more than initial treatment – they paid for a two-level cervical fusion, follow up treatment with the

neurosurgeon, and physical therapy. Treatment for the admitted "work-related injury" to Frampton's neck was provided much longer than the initial ten weeks, again confirming DNR's acceptance of the case and acknowledgment that Dr. Bailey's surgery tended to lessen Frampton's period of disability. See Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016)(employer has no obligation to provide treatment after ten weeks from notice of the injury unless additional treatment "in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty.")(*quoting* S.C. Code Ann. § 42-15-60(A) (2015)). Treatment and compensation (salary in lieu of compensation) was provided at least through May 17, 2011.[5] This date is well past the 150 day grace period where the employer can make a good faith denial of the claim.[6] See S.C. Code

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[5]DNR did not pay for the treatment for the temporary aggravation caused by the May 16, 2011 automobile accident. However, this was not because DNR refused to pay; rather Frampton elected to pay for the treatment personally with his health insurance rather than filing a new workers' compensation claim. Had he elected to file workers' compensation, the automobile accident would have been considered compensable under the Workers' Compensation Act. ng Beam v. State Workmen's Compensation Fund, 200 S.E.2d 83, 261 S.C. 327 (1973)(injury while traveling to or from out of town business trip arises out of the employment).

[6]In Jervey this Court reversed decisions of the commission and circuit court "finding section 42–9–260 of the South Carolina Code is a time bar for raising a defense against compensability." Jervey v. Martint Envtl., Inc., 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012). Jervey appealed arguing "section 42–9–260 provides that an employer may only raise compensability as a defense within the first 150 days after an injury if the employer begins paying benefits." Although affirming on other grounds, the South Carolina Supreme Court granted Jervey's petition for writ of certiorari and "vacate[d] that portion of the Court of Appeals' opinion addressing the import of section 42–9–260." Jervey v. Martint Envtl., Inc., 406 S.C. 210, 750 S.E.2d 90 (2013). The effect of this ruling is to restore the rule that section 42-9-260 is a 150-day time bar for raising a defense against compensability.

Note the one exception to this rule is subject matter jurisdiction – which is plainly not applicable here. See Frederick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct.

Ann. § 42-9-260 (2007)(creating a 150-day grace period during which employers could unilaterally suspend or terminate compensation for specified reasons – including when a "good faith investigation by the employer reveals grounds for denial.").

There are sound reasons for this rule. The workers' compensation system allows disabled workers to feed their families, pay the rent, and keep the lights when they cannot work and earn a paycheck. Workers' compensation is more than just a benefit to the individual worker; a stable and reliable system of benefits is good for our entire society. It would frustrate the beneficent purpose of the Act if those benefits so critical to working families could be terminated willy-nilly months or years after a promise to pay had been executed.

Not only was it error for the Appellate Panel to allow a denial under section 42-9-35 to be raised after 150 days, it is a violation of due process and fundamental fairness to permit Frampton to be blindsided by a defense not raised in the pleadings. "The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party." Scott v. Greenville Housing Authority, 353 S.C. 639, 579 S.E.2d 151 (Ct. App. 2003)(trial judge abused his discretion in denying motion for trial on damages only when liability had been admitted by failure of defendant to respond to Requests to Admit asking it to admit that it was responsible and liable for all damages).

The Court's opinion states "although DNR admitted an injury to Frampton's neck on its Form 51, it consistently denied he was entitled to benefits." Although this is an accurate statement, the Court overlooked that of the multiple reasons DNR asserted for denying benefits, not once did

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App. 2009)(holding a challenge to subject matter jurisdiction arising out of fraud in the application can be raised at any time).

DNR mention section 42-9-35. DNR denied Frampton was entitled to compensation for permanent and total disability compensation because (1) "he is currently earning $102,50.00 annually as Deputy Director of the South Carolina Department of Natural Resources," and (2) "On June 16, 2011, the Claimant aggravated his ***work-related neck injury*** in a motor vehicle accident . . ." [R. P. 37 (emphasis added)].

As to the first, this is not a denial of *some* permanent disability benefits. It is a denial of *total* disability permanent benefits. Or more precisely, it is a defense to rebut the statutory presumption that Frampton is totally disabled because he is working (Frampton conceded at trial that the presumption had been rebutted for this very reason). See Watson v. Xtra Mile Driver Training, Inc., 399 S.C. 455, 732 S.E.2d 190 (Ct. App. 2012) (evidence of a claimant's mere ability to return to work within her restrictions was alone sufficient to rebut the presumption of total permanent disability under section 42-9-30(21)). As with any case in which compensability is accepted, any workers' compensation defense lawyer will seek to minimize a permanent disability award.

As to the second, raising an intervening accident defense is not inconsistent with admitting a case is compensable. At most, an intervening accident may break the chain of causation from the date of the intervening accident. It has no effect on previous disability, particularly when , as here, the claimant underwent surgery paid for by his employer as part of an admitted claim prior to the intervening accident. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 436-37, 458 S.E.2d 76, 79 (Ct. App. 1995) (recognizing the "natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable"). In any case, the Commission rejected Respondents' allegation of an intervening accident. [R. P. 8, Finding of Fact 9].

The most remarkable aspect of Respondents' Prehearing Brief is the statement that the June

16, 2011 automobile accident aggravated the "***work-related neck injury***." [R. P. 37 (emphasis added)]. This is a plainly stated admission of the compensability of Frampton's work-related neck injury and the resulting surgery, impairment and disability. See Smith v. Pearson, 210 S.C. 524, 530, 43 S.E.2d 479, 481 (1947) (finding appellants bound by statement made by counsel at the outset of hearing).

In light of the admissions made by Respondents in their pleadings along with their overt acts manifesting acceptance of the claim long after their deadline to make a denial of the claim had passed, Appellant respectfully requests the Court to reconsider its decision and find that the Appellate Panel erred in reversing the Single Commissioner's finding that permanent disability compensation must be paid because Respondents "admitted the claim and provided medical treatment." [R. P. 7, Finding of Fact 7].

B. The Single Commissioner found the claim was admitted and that finding was not appealed.

Although the Court found Appellant was bound by law of the case despite having prevailed before the single commissioner, the Court overlooked the fact that DNR failed to appeal the Single Commissioner's finding of fact that permanent disability compensation must be paid because Respondents "admitted the claim and provided medical treatment." [R. P. 7, Finding of Fact 7]. As Respondents' failed to raise this issue in their Form 30, they failed to preserve it and are bound by the law of the case. See S.C. Code Ann. § 42-15-60 (2007)("Notice of appeal must state the grounds of the appeal or the alleged errors of law."). This issue was argued in detail in the Brief of Appellant at pages 8-10, yet this issue was not addressed the Court's opinion.

Indeed, not only did Respondents not appeal the critical factual finding, they did not appeal

the Single Commissioner's Conclusion of Law that "The Claimant sustained an injury to his neck by accident arising out of and in the course of his employment on September 4, 2010 pursuant to S.C. Code Ann. § 42-1-160." [R. P. 11, Conclusion of Law 1].

Respondents admit they did not appeal these essential findings. Interestingly, their response was to argue that they were not obligated to raise the issue because "the reversal of Hearing Commissioner's Order leaves it as if it had never been rendered – it is essentially no longer in existence. . . . Furthermore, the only appeal to this Court lies from the Final Decision and Order of the Appellate Panel." [Brief of Respondents, page 13 (internal citation omitted)]. If Respondents are correct, then it must necessarily mean that Appellants arguments are similarly not barred by the law of the case.

Appellant respectfully requests that the Court address the issue on the application of the law of the case raised in his brief as to Respondents and reverse that part of the decision that held his appeal is barred by the law of the case doctrine.

C. The statute the Appellate Panel used to reverse the award was neither properly raised as an issue or defense nor was it correctly applied by the Appellate Panel.

The Court held "DNR maintains § 42-9-35 is a statutory prerequisite to compensation benefits when there is a preexisting condition, rather than an affirmative defense. DNR argues it was not aware of Frampton's potential preexisting condition until receiving Frampton's medical records on the eve of the hearing before the single commissioner, at which time it raised the issue of § 42-9-35 without objection." Respectfully, Appellant believes that the Court overlooked the actual time at which § 42-9-35 was raised as well as misinterpreting the actual meaning and application of the statute.

At trial, Respondents *never raised* section 42-9-35. The statute was not an issue at trial and is mentioned nowhere in the trial record until it appears in the single commissioner's order. Furthermore, section 42-9-35 was misapplied, such that Frampton had no reason to suspect that the single commissioner and appellate panel could or would apply it *sua sponte* to the facts of this case..

"The claimant's right to compensation for aggravation of a preexisting condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury." Murphy v. Owens Corning, 393 S.C. 77, 86, 710 S.E.2d 454, 458 (Ct. App. 2011). Frampton's preexisting condition was dormant and nondisabling. It only became disabling when he underwent surgery for his work-related injury – becoming totally disabled for six weeks. Once that fact was established and admitted by Respondents, the only remaining proof necessary was a finding of MMI and proof of impairment and resulting disability. That proof was provided by Frampton's testimony and the medical opinions of Dr. Bailey in the 14B and questionnaire.

DNR made multiple vague arguments to the single commissioner in an effort to minimize the impact of Frampton's work-related injury. These run the gamut from mischaracterizing it as "simply a cervical strain or sprain" (which resulted in a two level cervical fusion!);to alleging a nonexistent new accident happened on November 4, 2010 (based on a scrivener's error in a letter Frampton wrote to the Director of the State Accident Fund); to an inaccurate statement alleging Blue Cross Blue Shield paid for the surgery (the State Accident Fund paid for it); and to the allegation of an intervening accident on June 16, 2011(rejected by the Commission). [R. P. 70-74]. The Court may note Appellant was not give a opportunity to respond to these arguments.

The only mention of an aggravation of a preexisting condition is buried in the middle of Respondents' opening statement at the call of the case. Respondents argued (inconsistently with

their pleadings) that:

> It is our position that there is no evidence that the Claimant sustained any additional injury or exacerbated his known preexisting condition as a result of the September 4, 2010 accident. The Claimant has a known preexisting condition, as indicated in dr. Bailey's records. Dr. Bailey diagnosed him with a C6-7 radiculopathy approximately six months prior to the dove field incident. The Claimant has a burden of proof that that preexisting condition was aggravated or exacerbated. We don't believe he's met that burden of proof.

[R. P. 71, lines 4-15].

Contemporaneously with making this argument, Respondents had moved to leave the record open for the deposition of Dr. Bailey. The Commissioner granted the motion because Dr. Bailey's deposition had been scheduled prior to trial but cancelled by Dr. Bailey due to no fault of either party. [R. P. 67, lines 11-23]. As such, even if there had been a genuine issue of causation or aggravation, Appellant would have had the opportunity to cure any such defect – had he been on notice of such a defect prior to the single commissioner's order. Brown v. La France Ind., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985)(when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice).

It has long been established that "the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995). By the same token, it has long been established that "a work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is also compensable." Id. Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987); Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960) (a quiescent weakened, but not

disabling condition accidentally aggravated, accelerated, or activated, with resulting disability, is compensable).

Given this long established rule, it begs the question of what the legislature intended to accomplish when it enacted section 42-9-35. Section 42-9-35 was a new statute included among several amendments to Title 42 passed in 2007.

One must ask that if proof of an aggravation of a preexisting condition was already an established requirement under section 42-1-160 (defining injury by accident), then what compelled the Legislature to pass section 42-9-35? And why was it made part of section 9 (Compensation and Payment) rather than section 1 (General Provisions)?

The answer to those questions is complicated, yet entirely logical. Section 42-9-35 arose due to the Legislature's desire to (1) eliminate the Second Injury Fund and (2) legislatively reverse the "combined effects" rule established Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

The purpose of the Second Injury 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.

To bring the instant case into focus, section 42-9-35 was not enacted to create an additional burden on an injured worker – certainly not in an accepted case. It would create an absurd result if a claim could be accepted, compensation paid and treatment provided, yet permanent disability compensation be denied at the 11th hour because the Act required a claimant to provide medical proof of an aggravation to receive that compensation (even when the doctor assigning the impairment rating for the work-related injury had been authorized to provide treatment and asked to provide the impairment rating by the employer). [R. P. 178, 183-184]. And this is the point of the placement of section 42-9-35 in the *Compensation and Payment* section following section 42-9-30 rather than the General Provisions section next to section 42-1-160.

Section 42-9-35 is not a compensability statute; it is a *non-apportionment* statute. Apportionment is a concept in some states where the disability compensation is apportioned between the preexisting condition and the resulting injury. In those states, a physician will be asked to apportion the impairment rating between the two, with compensation paid only for the disability resulting from the work accident. South Carolina is and always has been a hybrid non-apportionment state. Sections 42-9-150, -160 and -170 apportioned liability between the Employer and Second Injury Fund, whilst ensuring that the injured worker would receive full compensation.

With the elimination of the Second Injury Fund, the Legislature was unwilling to eliminate the additional compensation the claimant would otherwise receive from the Fund. The solution was the language in section 42-9-35 allowing the commission to award compensation for "resulting disability of the permanent physical impairment or preexisting condition *and* the subsequent injury" upon proof of the aggravation. S.C. Code Ann. § 42-9-35 (B). This solved the apportionment problem.

Section 42-9-35 was never intended to be applied as the Commission applied it here – as is apparent from a reading of the statute in its entirety. Moreover, Frampton was not given notice that the Commission would apply the statute in this manner because neither the Respondents nor the Single Commissioner notified him that section 42-9-35 was at issue until it appeared in the Single Commissioner's order.

For these reasons, Appellant respectfully requests the Court rehear and reconsider its decision on these issues.

3. The Single Commissioner erroneously used Frampton's post -injury return to work and his subsequent promotions as part of a legally incompetent permanent partial disability award.

The Single Commissioner awarded 20% permanent partial disability to Frampton's back under Section 42-9-30(21). The Court affirmed this award, albeit in dicta, holding (1) the issue was unpreserved and (2) "it is clear from the single commissioner's order that she only considered Frampton's return to work, subsequent promotions, and earning capacity in the context of determining the lack of credibility of Dr. Bailey's revised Form 14B and in determining Claimant was not entitled to benefits under S.C. Code Ann. § 42-9-10 (2015), which is not at issue."

Respectfully, Appellant believes the Court may have overlooked that issue of the legal inadequacy of the award is preserved as it was raised in the Form 30 and Appellant's brief to the Full Commission. The brief argues "This claim was awarded pursuant to § 42-9-30, SC Code of Laws, 1976, which does not require a showing of loss of income capacity. Appellant argued that the Single Commissioner analyzed the case as if it were a general disability case because she based the paucity of the award on Frampton's post-injury and promotions. [r. P. 44-46]. However, no where in the actual order does the single commissioner reference section 42-9-10.

For these reasons, Appellate requests that the Court reconsider its holding both as the preservation of the issue and that the Single Commissioner's findings on Frampton's promotion and earnings were improperly applied to section 42-9-30.

Additionally, Appellant believes the Court may have misapprehended the credibility given to the revised 14B by Dr. Bailey. Our Supreme Court recently addressed "the important role credibility findings play when credibility reasonably and meaningfully relates to factual disputes to be decided by the commission." Crane v. Raber's Discount Tire Rack, Op. No. 27951 (S.C. Supt. Ct. refiled April 29, 2018)(Shearouse Adv. Sh. No. 17 at 24). The court explained "where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact." Id. The court went on to reverse the commission's disregard of medical evidence on credibility grounds because the "permanent impairment caused [by the injury was] based on objective medical evidence." Id.

The same applies here. Dr. Bailey's 14B is based on the 5th edition of the AMA Guide (which the supreme court adopted as the standard in Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017). The AMA Guide provides that the impairment rating for a surgical fusion ("loss of motion of a motion segment due to a developmental fusion or successful or unsuccessful attempt at surgical arthrodesis") is to be determined under DRE Category IV or V. Cocciarella and Anderson; Guides to the Evaluation of Permanent Impairment (5th Edition), page 392.

Dr. Bailey's original 14B assigned an impairment rating of 20% to the cervical spine. [R. P. 178]. He modified the original 14B to comport with the 5th Edition of the AMA Guide. The corrected impairment rating was 26% of the whole person converted to 78% regional cervical spine

rating. At the request of the carrier, he confirmed his intent to change the original impairment rating and added the hand written notation referencing page 392 of the AMA Guides. [R. P. 183-184]. As it is directly out of the AMA Guides, this is objective medical evidence of his impairment rating.

The Single Commissioner found "Based on Claimant's return to work and promotions received since his original date of injury, I give Dr. Bailey's revised Form 14B very little weight due to his opinion that Claimant couldn't return to his current employment. That opinion is completely disproven by the facts of the case and calls into question *the additional information placed in the revised Form 14B."* [R. P. 9, Finding of Fact 14(emphasis added)]. The fundamental problem with this finding is that the statement about being unable to return to his current employment is the same in both the original and revised 14B. It is therefore arbitrary and capricious for the Single Commissioner to give reduced weight to the 14B correcting the impairment rating when her reason is entirely unrelated to the correction. The commission erred in denying Crane's claims for hearing loss based on credibility without explaining any basis on which credibility could justify ignoring objective medical evidence. Her finding must be reversed as it is unsupported by substantial evidence. Crane v. Raber's Discount Tire Rack, Op. No. 27951 (S.C. Supt. Ct. refiled April 29, 2018)(Shearouse Adv. Sh. No. 17 at 24)(reversing commission for denying claim "based on credibility without explaining any basis on which credibility could justify ignoring objective medical evidence.").

This case should be remanded to the Appellate Panel to determine Frampton's permanent partial disability under section 42-9-30(21) based on the framework set forth in Clemmons. The Commission should be directed to apply the 78% regional cervical spine rating and Dr. Poletti's 80% regional cervical spine rating (converted from 28% whole person rating). The Commission should

be directed not to consider that Frampton has been promoted (to a much less physically demanding job) with increased earnings as the Director of the Department of Natural Resources.

CONCLUSION

For the foregoing reasons, the Court should reconsider its opinion, reverse and remand to the Commission for determination of the appropriate permanent partial disability award under Clemmons.

Respectfully Submitted,

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May 28, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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May 28 2020
SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2017-001764

Chisholm Frampton, ... Appellant,

v.

SC Department of Natural Resources, Employer, and
The State Accident Fund, ... Respondents.

PROOF OF SERVICE

I certify that I, Wanda Powell, paralegal to Stephen B. Samuels have caused the **Notice of Appearance** and **Petition for Rehearing** to be served upon the below parties on May 28, 2020, addressed as follows:

Kirsten L. Barr, Esquire
Trask & Howell, LLC
P.O. Box 2167
Mt. Pleasant, SC 29465
via email: kbarr@trask-howell.com

Wanda Powell
Paralegal to Stephen B. Samuels

May 28, 2020
Columbia, South Carolina

SAMUELS REYNOLDS
LAW FIRM

STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

May 28, 2020

RECEIVED
May 28 2020
SC Court of Appeals

Via US Mail
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Chisolm Frampton v. SC Department of Natural Resources
Appellate Case No. 2017-001764

Dear Ms. Kitchings:

Enclosed for filing, please find the Appellant's **Notice of Appearance** and **Petition for Rehearing** in the above-referenced matter. Upon receipt, I would kindly ask if you would please forward, to our office, a clocked copy. A filing fee check, made payable to the SC Court of Appeals in the amount of $50.00, was placed in the United States mail dated for today.

By copy of this letter and enclosure to Kirsten L. Barr, counsel of record for the Respondents, we are serving her with a copy of the **Notice of Appearance** and **Petition for Rehearing** as indicated by the enclosed Proof of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Respectfully,

Stephen B. Samuels

/wp
Enclosure(s) as stated (***Via email: ctappfilings@sccourts.org***)

cc: Kirsten L. Barr, Esquire ***(Via email: kbarr@trask-howell.com)***
John C. Land, III ***(Via email: pat@lpwlawfirm.com)***