THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
T. Scott Beck, Commissioner

W.C.C. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee,.....Appellant,

v.

SC Department of Natural Resources, Employer, and
South Carolina State Accident Fund, Carrier.....Respondents.

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING

The Respondents, the South Carolina Department of Natural Resources and the State Accident Fund, respectfully request that the Petition for Rehearing filed by the Appellant, Chisholm Frampton be DENIED pursuant to Rule 221(a), S.C.A.C.R.. By their majority opinion filed May 13, 2020, the Court of Appeals neither overlooked, nor misapprehended, any argument raised by Frampton's appeal. Furthermore, the Petition is based upon misrepresentations of fact and law, raises new issues not preserved for appeal or contained in the Record, and otherwise argues matter not relevant to the Court's disposition of the case.

Statement of the Case

Frampton alleges that on September 4, 2010, he was working a dove field "when pain suddenly occurred in his neck." (R. p.31). He was seen at Doctor's Care three days later on September 7, 2010, where he was diagnosed with a "cervical strain." (R. p.158). Frampton was seen again at Doctor's Care on September 17, 2010, at which time his diagnosis was "resolving cervical muscle strain" and he was released to "full duty" without any restrictions and without any recommendation for additional medical treatment. (R. pp.160—161). On September 23, 2010, the Respondents filed a Form 19 the Workers' Compensation Commission formally denying the claim and, as a result, the Workers' Compensation Commission closed Frampton's workers' compensation claim on September 28, 2010.[1] (*See* Exhibit 2 to the Respondent's Return to Frampton's Motion to Supplement the Record on Appeal).

After more than four years of working his regular, full-duty job, Frampton filed a Form 50 claiming additional benefits under the Workers' Compensation Act on November 18, 2014. (R. p.31). By Form 51 dated December 4, 2014, the Respondents admitted the alleged dove field incident, but specifically denied the "extent of injury" and further denied that Frampton was entitled to any medical or compensation benefits

[1] Frampton's claim was not re-opened until July 8, 2011, which is after he alleged a new injury to his neck as a result of a motor vehicle accident in Florida while operating a state vehicle and after he wrote to the Director of the State Accident Fund alleging an injury to his neck on November 4, 2010. (R. p.169, pp.248—249). During the period between September 28, 2010 and July 8, 2011, the Respondents did not pay any workers' compensation benefits to Frampton or on his behalf.

as a result. (R. p.32). Contrary to the Frampton's allegations, the Respondents did not, at any time, admit "liability" for workers' compensation benefits.

Instead, the Respondents consistently argued that the September 4, 2010 dove field incident caused nothing more than a "strain" injury that quickly resolved. (R. pp.37—40; p.70, line 20–p.71, line 3; pp.158--161). The Respondents further argued that Frampton did not aggravate any of his known pre-existing conditions, which include a C6-7 radiculopathy diagnosed approximately six months earlier. (R. p.71, lines 4--15). In addition, the Respondents argued that Frampton reinjured his neck in a subsequent intervening accident on November 4, 2010, after which he required a cervical fusion surgery that was covered under the State Health Plan. (R. p.71, line 20--p.72, line 4; Return to Motion to Supplement Record on Appeal Ex.1). Frampton later reinjured his neck in yet another subsequent, intervening motor vehicle accident on May 16, 2011. (R. p.32 #6, p.72, lines 4--21). Therefore, the Respondents consistently argued that any permanent loss of us of the neck (back), as well as any need for medical treatment, is not causally-related to the dove field incident of September 4, 2010 and is not the responsibility of the Respondents.

An evidentiary hearing was held by Commissioner Taylor on July 15, 2017, pursuant to the Forms 50 and 51. (R. p.66). In her October 3, 2016 Decision and Order, Commissioner Taylor awarded Frampton benefits for a 20% loss of use of the back, despite finding that he "suffered from pre-existing neck pain and right arm numbness" and that

> "there is no medical evidence stated to a reasonable degree of medical certainty that [Frampton's] September 4, 2010 dove field incident

> aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon." (R. p.7 #7).

Commissioner Taylor also concluded that Frampton "did not meet his burden of proof under S.C. Code Ann. § 42-9-35." (R. p.11 #2). Neither these findings, nor this conclusion, were appealed by Frampton to the Commission's Appellate Panel. (R. p.41).

In fact, the sole issue raised by Frampton's October 17, 2016 Form 30, Request for Commission Review, was

> "The Single Commissioner erred in regard to the finding that the injured worker only lost 20% of the spine inasmuch as the finding is not consistent with the substantial evidence in the record, which indicates a greater percentage of loss of use of the spine or a finding of permanent and total disability pursuant to §42-9-30." (R. p.41).

Neither Frampton's Form 30, nor his brief to the Commission's Appellate Panel, make any reference to any evidence that could support a claim of causation, or to his statutory burden of proof under S.C. Code Ann. § 42-9-35, or to Commissioner Taylor's finding and conclusion that he had failed to meet that statutory burden. (R. p.41, lines 44—47).

The Respondents filed a cross-appeal by Form 30 dated October 17, 2016, arguing, *inter alia*,

> "Did the Hearing Commissioner err as a matter of law in awarding medical and compensation benefits to the Claimant after finding and concluding that the Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35?" (R. p.43 #1).

The sum total of Frampton's response to this argument, contained in his Brief to the Appellate Panel, is as follows:

> "This is an admitted claim accepted by the Director of the State Accident Fund, Mr. Harry Gregory. The argument of the Defendants comes too late inasmuch as the Defendants have accepted the claim and now the question is should additional benefits be paid to the injured Worker [sic] for permanent disability and loss of use of the spine." (R. p.61 "I").

Frampton's Brief to the Appellate Panel cited no legal authority and otherwise made no argument that any evidence exists connecting his pre-existing neck problem, or his need for medical treatment, or any permanent disability, to the September 4, 2010 dove field incident. (R. pp.60—62).

As a result, the Commission's Appellate Panel issued its final Decision and Order dated July 24, 2017, concluding,

> "1. Pursuant to S.C. Code Ann. § 42-9-35, an "employee shall establish by a preponderance of the evidence, including medical evidence, that ...the subsequent injury aggravated the pre-existing condition." (emphasis

added). Use of the term "shall" mandates that this burden of proof is mandatory. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002)("under the rules of statutory interpretation, use of the words 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). Based upon the greater weight of the evidence and the established facts of this case, § 42-9-35 applies to the present claim for benefits. The Hearing Commissioner ruled that the *"Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-existing condition. In fact, the records of the Claimant's treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and the Claimant's own statements to Dr. Bailey indicate that his neck problems began in January 2010."* The Hearing Commissioner's rulings in this regard were correct and, furthermore, because they were not appealed, they are affirmed as the law of the case. (R. pp.29—30) (emphasis original).

However, the Appellate Panel's ultimate conclusion was based solely on Frampton's failure of proof, not operation of law:

2. Because the Claimant **has failed to satisfy his burden of proof** under S.C. Code Ann. § 42-9-35, he is not entitled to any benefits under

> the Workers' Compensation Act as a matter of law." (R. pp.29—30) (emphasis added).

The Appellate Panel reversed and vacated the remainder of the Hearing Commissioner's conclusions of law, specifically including the award of benefits under S.C. Code Ann. § 42-9-30. (R. p. 27).

In his appeal to the Court of Appeals, Frampton made no attempt to dispute the fact that his neck problems and need for medical treatment pre-existed the events of September 4, 2010, or the fact that there is no medical evidence in the record to support a finding that the work accident aggravated his pre-existing condition. Indeed, Frampton did not appeal the Appellate Panel's finding that

> "[Frampton's] physician, Dr. Bailey, never addressed the issue of whether the alleged accident on September 4, 2010 aggravated the pre-existing neck and right arm conditions for which he had previously treated [Frampton] and there are no other documents, records or other material that address this issue in the Record of this claim." (R. p.29 #7).

Instead, Frampton argued that he did not need to prove that his condition was causally-related to the events of September 4, 2010 under S.C. Code Ann. § 42-9-35 or § 42-1-160 in order to be entitled to benefits for permanent disability under S.C. Code Ann. § 42-9-30.

The Court of Appeals filed its Opinion on May 13, 2020 rejecting this argument and concluding that

> None of Dr. Bailey's medical records mention the dove field incident. This, taken with the fact that Frampton had already seen Dr. Bailey at least six months before the incident for the same injury, is **substantial evidence** supporting the appellate panel's conclusion that Frampton's treatment with Dr. Bailey, including this surgery, was not causally related to the dove field incident but was part of a long-term, ongoing course of treatment for Frampton's progressive, degenerative, disc disease, which had begun years prior. (emphasis added).

The Court of Appeals also rejected

> "Frampton's argument that the single commissioner erroneously considered his post-injury return to work and subsequent promotions in estimating the percentage of his impairment."

Not only was this issue is unpreserved on appeal, but the Court of Appeals correctly concluded that Frampton's return to work and subsequent promotions were properly considered by Commissioner Taylor as she weighed certain evidence .[2]

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[2] Note that the Commission's Appellate Panel's Order states that Commissioner Taylor's "award of benefits under S.C. Code Ann. § 42-9-30(21)...is hereby reversed and vacated as a matter of law." Therefore, Commissioner Taylor's analysis of this issue is of no legal import. (R. p.27).

The Respondents respectfully contend that the Court of Appeals misapprehended no issue and overlooked no argument in properly concluding that the Commission's denial of benefits under S.C. Code Ann. § 42-9-30 is based upon proper application of the law and upon substantial evidence in the record that Frampton's neck problem for which he seeks disability compensation was neither caused, nor aggravated, by his work in a dove field on September 4, 2020.[3] The Respondents further contend that Frampton's arguments regarding findings previously vacated by the Commission have no merit.

Arguments

I. The Court of Appeals properly concluded that the Respondents did not admit liability for permanent disability benefits under the Workers' Compensation Act.

Frampton inexplicably argues that he is entitled to an award under S.C. Code Ann. § 42-9-30 because he claims "liability was admitted" by the Respondents and that this "fact" is the law of the case.[4] This argument is wholly without merit. Indeed, the Court of Appeals correctly noted that "although DNR admitted an injury to Frampton's

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[3] Frampton's Petition for Rehearing inexplicably states that the Court of Appeals "issued an opinion affirming in part, reversing in part, and remanding the Decision and Order of the South Carolina Worker's Compensation Commission." However, the Opinion clearly states that the Commission's Decision was simply "AFFIRMED."

[4] Frampton also misstates the Hearing Commissioner's finding, suggesting that the Hearing Commissioner found that "liability was admitted." This is incorrect. The Hearing Commissioner noted only that the Respondents "admitted the claim," *i.e.*, admitted that the claim met the requirements of S.C. Code Ann. § 42-1-160. (R.p.7 #7).

neck on its Form 51, it consistently denied he was entitled to benefits." Moreover, it further appears that Frampton is under a gross misapprehension of the Workers' Compensation Act's statutory requirements, as his Petition for Rehearing boldly suggests that

> "Workers' compensation cases progress along a continuum. If the claim is accepted, medical treatment is provided and temporary disability compensation is paid. Once the worker reaches MMI, compensation is provided as either permanent total or partial disability..."

What this facile argument fails to consider is that even when an employee meets his burden of proving an injury by accident arising out of and in the course of his employment pursuant to S.C. Code Ann. § 42-1-160, he is not automatically entitled to any benefits whatsoever. Instead, if he wishes to collect temporary disability compensation, he is required to prove his entitlement to these benefits under S.C. Code Ann. §§ 42-9-10, 42-9-20, and/or 42-9-260 by showing that he has a temporary loss of wage-earning capacity as a result of the work accident. *See* Lee v. Bondex, Inc., 405 S.C. 97, 102, 749 S.E.2d 155 ,157 (Ct. App. 2013: *see also* Crisp v South Co., 401 S.C. 627, 645, 738 S.E.2d 835, 844 (2013). If he desires medical benefits, an employee is required to prove his entitlement to medical benefits under S.C. Code Ann. § 42-15-60 with "evidence stated to a reasonable degree of medical certainty" that he requires medical treatment to lessen the period of disability caused by the work-accident. *See* Crisp v South Co., *supra*; *see also* Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Thereafter, if the employee expects payment of permanent disability benefits,

he must actually prove – with evidence – that he has a permanent loss of wage-earning capacity or permanent loss of use of a scheduled body member as a result of the work accident under S.C. Code Ann. §§ 42-9-10, 42-9-20, or 42-9-30. *See* Wigfall v Tideland Utilities, Inc., 354 S.C. 100, 105, n.3, 580 S.E.2d 100, 102, n.3 (2003) (internal citations omitted); *see also* Coleman v. Quality Concrete, 245 S.C. 625, 142 S.E.2d 43 (1965). If the employee has a pre-existing condition, the plain language of S.C. Code Ann. § 42-9-35 places a heightened, mandatory burden of proof upon him to show, with expert medical evidence, that the accident aggravated the pre-existing condition. No workers' compensation benefits flow automatically from S.C. Code Ann. § 42-1-160 as Frampton suggests, instead such benefits are governed by multiple statutes with varying burdens of proof. While in some claims the employer admits liability for benefits without the necessity of a hearing, plainly, that was not true in the case *sub judice.*

Three days after the alleged events of September 4, 2010, Frampton was seen at Doctor's Care at the request of the Respondents, where he was diagnosed with a "cervical strain." (R. p.158). By September 17, 2010, Frampton's "cervical muscle strain" was considered to be "resolving" and he was released to "full duty" without any work restrictions and without any recommendation for additional medical treatment. (R. pp.160—161).[5] Thereafter, on September 23, 2010, the Respondents formally denied the

[5] Frampton did not seek additional medical treatment until six months later when he reported to Dr. Bailey that he had a "14 month" history of neck pain that occurred "gradually." (R. pp.263—266; p.166). Dr. Bailey performed surgery a week later on March 21, 2011 and records reflect his "Financial Class" was "Blue Cross." (R. p.201). Frampton did not have an active workers' compensation claim in March 2011 and the Respondents did not authorize the surgery or treatment with Dr. Bailey. (*See* Return to Motion to Supplement Record on Appeal, Ex.2). Even Frampton previously admitted

claim and filed a Form 19 with the Workers' Compensation Commission, which closed Frampton's workers' compensation claim on September 28, 2010.[6] (*See* Exhibit 2 to the Respondent's Return to Frampton's Motion to Supplement the Record on Appeal).

On November 18, 2014, when Frampton first filed a Form 50 claiming additional benefits under the Workers' Compensation Act, he characterized his accident as follows:

> "Injured worker was bouncing along in a pick-up truck in a rough dove field when pain suddenly occurred in his neck and right arm."(R. p.31).

By Form 51 dated December 4, 2014, the Respondents did not deny that Frampton may have felt "pain" in his neck on September 4, 2010 as alleged on his Form 50, but the Respondents specifically denied the "extent of injury" and further denied that Frampton was entitled to any medical or compensation benefits as a result. (R. p.32).

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that "...**nobody contests** – that the neurosurgeon's notes do not reference a work-related injury and that some of the records from the March visit and surgery list Frampton's health insurance[5], not workers' compensation. (R. pp.166-168; 196-197; 201; 203)." (Appellant's Brief pp.1—2*) (emphasis added).*

[6] Frampton's claim was not re-opened until July 8, 2011, which is after he alleged a new injury to his neck as a result of a motor vehicle accident in Florida while operating a state vehicle and after he wrote to the Director of the State Accident Fund alleging an injury to his neck on November 4, 2010. (R. p.169, pp.248—249). During the period between September 28, 2010 and July 8, 2011, the Respondents did not pay any workers' compensation benefits to Frampton or on his behalf.

Contrary to the Frampton's allegations, the Respondents did not, at any time, admit "liability" for workers' compensation benefits. This fact is made clear on the Respondent's Form 51, which states:

- "It is Denied the employee Needs/Is Entitled to Additional medical care as a result of injury or illness;"
- "It is Denied the employee is entitled to temporary total disability," and
- "It is Denied the employee is permanently disabled." (R. p.32).

Nothing about the Respondent's Form 50 admits that the events in a dove field on September 4, 2010 aggravated Frampton's pre-existing condition, that Frampton was entitled to any additional benefits under the Workers' Compensation Act as a result, or that Frampton had any causally-related permanent disability.

Similarly, on their Form 58, Pre-Hearing Brief, the Respondents described the admitted injury as follows: "Claimant was walking in a dove field and later complained of neck pain." (R. p.37). Not only does the Respondents' Form 58 not admit any injury aside from neck pain, which Doctor's Care described as a "cervical muscle strain" when Frampton was released without restrictions or further treatment inside of two weeks, but the Respondents' Form 58 also specifically denies Frampton was entitled to any compensation for permanent disability under S.C. Code Ann. § 42-9-30. (R. pp.158—161; p.39). The Respondent's Form 58 clearly states that "Frampton "suffered a non-disabling neck injury as a result of the September 4, 2010 work accident" and questions the degree of any disability "causally-related to the September 4, 2010 accident, for which he was originally released to full duty without restrictions and for which no

additional medical treatment was recommend." (R. pp.38-39, pp.158--161). The Respondents did not admit the existence of any causally-related disability or that Frampton was entitled to any additional benefits under the Act in their Form 58 or at any other time. (R. p.32, pp.37—39, p.70, line 20—p.74, line 2).

Simply because the Respondents admitted the existence of neck pain during the dove field incident under S.C. Code Ann. § 42-1-160, this did not absolve Frampton of burden of proving his entitlement to benefits under the Workers' Compensation Act. Instead, even where an accident is admitted, the burden is upon the employee to prove by a preponderance of evidence that he is entitled to the benefits he claims under S.C. Code Ann. § 42-9-30.[7] *See* Fields v. Owens Corning Fiberglass, 301 S.C. 554, 393 S.E.2d 172 (1990) (holding that an "award under the scheduled loss statute, however, is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific 'member, organ, or part of the body.'). Where, as is here, there is a pre-existing condition, the employee faces an additional burden of proof under S.C. Code Ann. § 42-9-35 before he can be entitled to any compensation benefits.

Nothing about the Respondents conduct in this claim excused Frampton's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35. Indeed, everything about the Respondents' pleadings put Frampton on notice that the Respondents denied he was entitled to any additional benefits under the Workers' Compensation Act. Therefore, not only was Frampton required to prove he has a permanent loss of use of his back, but

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[7] Note that the Appellant has abandoned his claims to benefits under any other provision of the Workers' Compensation Act, including any claim for medical benefits. (R. p.41, pp.44-46, pp.60—62).

he was also required to prove that alleged loss was causally-related to the dove field incident on September 4, 2010, as opposed to his pre-existing condition or a subsequent intervening accident. Despite Frampton's statutory burden of proof and despite the Respondent's denials that this burden had been met, Frampton failed to prove, with actual evidence, that his alleged disability was casually-related to the events in the dove field on September 4, 2010. *See* Bundrick v. Powell's Garage, 248 S.C. 496, 151 S.E.2d 437 (1966) (holding that an award of benefits under S.C. Code Ann. § 42-9-30 must be founded on evidence of sufficient substance and not mere surmise, conjecture, or speculation). As such, Frampton's arguments regarding the Respondents' admissions are neither factually accurate, nor legally relevant, and were properly rejected by the Court of Appeals. Therefore, the Respondents respectfully request that the Petition for Rehearing be denied.

II. Frampton's new arguments regarding the application of S.C. Code Ann. § 42-9-260, which were not preserved for appeal, are not properly before the Court of Appeals on a Petition for Rehearing, are otherwise without merit.

Frampton argues for the first time in his Petition for Rehearing "that section 42-9-260 is a 150-day time bar for raising a defense against compensability." There is no reference to, or even mention of, S.C. Code Ann. § 42-9-260 in Frampton's appeal to the Commission's Appellate Panel, his briefs to the Appellate Panel, or in his Briefs to the Court of Appeals. (R. p.43; pp.44-47; pp.60—62; Brief of Appellant p.iii; Reply Brief p.ii). As such, Frampton neither raised below nor preserved for appeal, any argument that S.C. Code Ann. § 42-9-260 somehow applies to this case and effectively eliminates

Frampton's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35. Therefore, this novel argument is not the proper basis for a Petition for Rehearing. *See* Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d (1933) (holding that "[t]he purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this Court a second time.")

In addition, Frampton's new argument regarding S.C. Code Ann. § 42-9-260 is wholly without merit. Frampton inexplicably contends that

> "[t]reatment and compensation (salary in lieu of compensation) was provided at least through May 17, 2011. This date is well past the 150 day grace period where the employer can make a good faith denial of the claim. See S.C. Code Ann. § 42-9-260 (2007) (creating a 150-day grace period during which employer could unilaterally suspend or terminate compensation for specified reasons – including when a "good faith investigation by the employer reveals grounds for denial." (Petition pp.10—11).

However, not only has Frampton never argued that S.C. Code Ann. § 42-9-260 operates to eliminate his burden of proof under S.C. Code Ann. § 42-9-30, or § 42-9-35, or any other statutory requirement; but S.C. Code Ann. § 42-9-260 does not apply to the facts of this case.

Frampton admittedly received sick leave benefits for the period he was out of work (March 21, 2011 through May 11, 2011) (R. p.84, l.2). During this time, Frampton

did not even have an active workers' compensation claim.[8] (R. p.83, ll.22—24). Because Frampton never sought or received temporary disability benefits, S.C. Code Ann. § 42-9-260 is simply inapplicable. Perhaps more importantly, S.C. Code Ann. § 42-9-260 says absolutely nothing about an employee's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35 being eliminated if he receives temporary disability compensation for more than 150 days.

In addition, Frampton's attempts to argue that, by virtue of S.C. Code Ann § 42-9-260, the payment of unspecified medical bills beyond 150 days after the accident also somehow eliminates his burden of proof under S.C. Code Ann. § 42-9-30 and § 42-9-30. This argument is similarly frivolous and otherwise not preserved for appeal. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (internal citations omitted).

According to his Petition for Rehearing,

> "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

[8] Frampton's claim was closed in September 2010 after he was released by Doctor's Care without restrictions or recommendation for additional medical treatment. (R. p.161; Return to Motion to Supplement Record on Appeal Ex.2).

later deny the claim upon a good faith investigation. So long as the denial is made within the first 150 days[9], it is considered timely." (Petition p.9).

However, as the Court of Appeals correctly noted, not even the provision of medical treatment for nearly five times as long (728 days) constitutes a waiver of the right to contest compensability of an employee's injury, citing Dozier v. Am. Red Cross, 411 S.C. 274, 292-293, 768 S.E.2d 222, 231-232 (Ct. App. 2014).

Of course, S.C. Code Ann. § 42-9-260 does not speak to the payment of medical bills whatsoever, much less purport to eliminate an employee's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35 based on the amount or duration of payments.[10] In addition, nothing about the payment of medical benefits would lead a reasonable person to believe that such burdens under S.C. Code Ann. § 42-9-30 or § 42-9-35 are eliminated, especially in the context of a Form 51 which specifically denies liability for

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[9] The notion of a "150 days" limit is a reference to S.C. Code Ann. § 42-9-260.

[10] The Record contains no evidence regarding the payment of specific medical bills or their amounts. While Frampton has filed a Motion to Supplement the Record on Appeal to show that medical expenses have been paid, he has not proffered any evidence to substantiate his claims regarding payment of bills for specific services. As noted in the Return to Motion to Supplement the Record and herein above, the Respondents provided Frampton with two visits to Doctors Care in September 2010, his workers' compensation claim was closed by September 28, 2010. Frampton's workers' compensation claim was not reopened until July 8, 2011, after Frampton alleged a new injury to his neck as a result of a motor vehicle accident in Florida while operating a state vehicle and after he wrote to the Director of the State Accident Fund alleging an injury to his neck on November 4, 2010. (R. p.169, pp.248—249). Thereafter, medical expenses were paid by the Respondents without further agreement or order of the Commission.

any additional benefits under the Act.[11] Furthermore, as the Court of Appeals correctly explained, if the provision of medical benefits were deemed an admission of liability, it

> "would discourage employers from providing any level of treatment for a certain condition for fear that providing treatment for a potentially unrelated condition would irrevocably affect a future finding on

[11] The Dozier case involved arguments of equitable estoppel and waiver. Frampton has never articulated any such common law equitable argument, only a new argument regarding an alleged statutory waiver provision under S.C. Code Ann. § 42-9-260. Furthermore, Frampton's "unclean hands" should bar him from raising any such equitable argument. *See* Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945) ("He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."); Wilson v. Landstrom, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (quotations and citations omitted). Not only did Frampton deny the very existence of his pre-existing condition on his Form 50, he claimed that he did not "recall" seeking treatment for his pre-existing condition when testifying before Commissioner Taylor. (R. p.31, p.80, lines 20—24, p.81, lines 4—8). This led to Frampton being impeached (R. p.95, line 25—p.99, line 5; p.104, line 18—p.109, line 1) with his own prior medical records (R. pp.243—246), which were received by the Respondents on the eve of the hearing, without objection. As a result, Commissioner Taylor found that "I do not find Claimant's testimony to be very credible with regard to the extent of his pre-existing neck condition and his current symptomology." (R. p.28).

permanent disability." Dozier v. Am. Red Cross, 411 S.C. 274, 292–93, 768 S.E.2d 222, 231–32 (Ct. App. 2014).

Therefore, the Court of Appeals properly applied case law firmly establishing an employer's right to contest the issue of permanent disability when medical benefits are provided, even when they are provided for years.

Respectfully, the Respondents contend that the Court of Appeals did not misapprehend Frampton's argument, or otherwise misapprehend the legal significance of S.C. Code Ann § 42-9-260, because Frampton did not actually raise any such argument to the Commission or to the Court of Appeals, and because S.C. Code Ann. § 42-9-260 does not otherwise apply to the facts of this case.

III. The Court of Appeals correctly concluded that S.C. Code Ann. § 42-9 35 is a mandatory, statutory pre-requisite to compensation benefits when there is a pre-existing condition, not an affirmative defense.

Because Frampton has a pre-existing condition, both the Workers' Compensation Commission and the Court of Appeals properly concluded that, before he can be awarded any compensation benefits, Frampton is subject to a mandatory burden of proof under S.C. Code Ann. § 42-9-35. All payments of compensation under S.C. Code Ann. § 42-9-10, § 42-9-20, or § 42-9-30 require proof of a causal-relationship between a work accident and the claimed disability. *See* Singleton v . Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960). However, employees are subject to an additional,

heightened burden of proof when there is evidence of a pre-existing condition by virtue of S.C. Code Ann. § 42-9-35.

On its face, S.C. Code Ann.§ 42-9-35 governs "Compensation and Payment Thereof" (the chapter title) when there is "Evidence of pre-existing injury or condition" (the code section title). This statute clearly and unequivocally requires

> "(A) The employee **shall** establish by a preponderance of the evidence, including the medical evidence that: (1) the subsequent injury aggravated the pre-existing condition..." (emphasis added).

The plain language of the statute make it clear that there is no condition precedent to the application of S.C. Code Ann. § 42-9-35 other than the existence of a pre-existing condition. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)).

Similarly, S.C. Code Ann. § 42-9-35 makes no distinction between accidents that are denied, rather than admitted. Furthermore, simply because the Respondents admitted that Frampton's claim of neck "pain" in the dove field on September 4, 2010 [12] met the requirements of S.C. Code Ann. § 42-1-160, Frampton's burden of proof under S.C. Code Ann. § 42-9-35 was in no way eliminated, as these are separate statutes governing separate issues. At no time did the Respondents concede that the

[12] See R. pp.31—32.

requirement of § 42-9-35 had been met, nor did Frampton make any attempt to prove that the condition for which he seeks permanent disability compensation is causally-related to the events in the dove field on September 4, 2010, as opposed to his pre-existing condition.

Furthermore, § 42-9-35 is not, as Frampton suggests, an affirmative defense. The very face of the statute makes it plain that the only burden is placed squarely upon him – "[t]he employee shall establish" – and the statute otherwise places no affirmative obligation upon the Respondents. Of course, the use of the term "shall" indicates that Frampton's burden of proof under § 42-9-35 is mandatory. *See* Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("under the rules of statutory interpretation, use of the words 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). In addition, "[t]he difficulty in proving a fact compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party." Lorick v. S.C.E.&G., 245 S.C. 513, 524, 141 S.E.2d 662, 668 (1965) (internal citations omitted).

Frampton's tortious argument regarding his own unfounded opinions regarding the legislative history and statutory construction of S.C. Code Ann. § 42-9-35 are not properly raised for the first time in a Petition for Rehearing, nor are they compelling. *See* Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d (1933). According to Frampton's new argument, which was never raised[13] before the Workers' Compensation

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[13] *See* Rule 207(b)(1)(B) ("[o]ridnarily, no point will be considered which is not set forth in the statement of issues on appeal"); *see also* Rodney v. Michelin Tire Corp., 320 S.C. 525, 466 S.E.2d. 357 (1996) (holding that issues not raised to the Workers' Compensation Commission are not preserved for appeal).

Commission or on appeal to the Court of Appeals, "42-9-35 was not enacted to create an additional burden on an injured worker – certainly not in an accepted case." Respectfully, that is the exact reason why S.C. Code Ann § 42-9-35 was enacted and, on its very face, it applies whether or not a claim otherwise meets the requirements of S.C. Code Ann. § 42-1-160.

In 2007, legislation including S.C. Code Ann. § 42-9-35 was introduced following the recommendations of Governor Sanford's Task Force on Workers' Compensation Reform.[14] One of central foci of the Task Force had been the Commission's seemingly unfettered authority to award compensation benefits in the absence of competent proof of causation.[15] To rectify this situation and ensure that benefits were only awarded upon proof by medical evidence, the Legislature amended or enacted requirements of proof by "expert opinion or testimony stated to a reasonable degree of medical certainty" in all medically-complex cases (S.C. Code Ann. § 42-9-160(E)), all claims of repetitive trauma

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[14] The undersigned was a member or the Governor's Task Force on Workers' Compensation Reform.

[15] The final Report and Recommendations of the Task Force identified the following:

> ***Issue:*** *Tiller v. National Healthcare (burden of proof)*
>
> ***Discussion:*** *In Tiller, the South Carolina Supreme Court held that a claimant is not required to provide expert witness testimony to prove causation in a medically complex case. Legislation is needed to specify that the burden of proof is upon the claimant, and that proof of causation in a medically complex case requires expert witness testimony.*
>
> ***Recommendation:***
>
> - *Codify standard burden of proof by a preponderance of competent evidence.*
> - *Require expert medical opinions on issues of causation, where contested, and on permanent impairment to be stated "to a reasonable degree of medical certainty." Otherwise, awards are speculative.*
> - *Allow for direct oversight of commission by the governor and/or commission chairperson to discourage speculative awards and ensure uniformity in decisions.*

(S.C. Code Ann. § 42-1-172), all occupational disease claims (S.C. Code Ann. § 42-11-10), all claims for medical benefits beyond ten weeks (S.C. Code Ann. § 42-15-60)[16], and all claims for compensation where there is evidence of a pre-existing condition (S.C. Code Ann. § 42-9-35).[17]

Frampton's argument that S.C. Code Ann. § 42-9-35 is merely an apportionment statute[18], or that it does not apply where the requirements of S.C. Code Ann. § 42-1-160 have been met, are not only devoid of evidentiary support and unpreserved for appeal, but improper in light of the plain language of the statute itself. Here, the language of

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[16] In Hartzell v. Palmetto Collision, the Court of Appeals considered the purpose of the 2007 "medical evidence" requirement amendment to S.C. Code Ann. § 42-15-60 and concluded that "the General Assembly added a requirement for expert medical evidence to support an award of additional treatment and limited the Appellate Panel's broad discretion to order such treatment in a case or controversy between the employer and the employee." 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). The Hartzell Court further held that this heighted burden of proof applied irrespective of whether the claim was admitted or denied under S.C. Code Ann. § 42-1-160.

[17] The summary accompanying S0332, introduced in Senate Session 117 (2007), which was enacted (Act 111) during that same session, states the purpose of S.C. Code Ann. § 42-9-35 is "TO PROVIDE THAT THE EMPLOYEE SHALL ESTABLISH BY THE PREPONDERANCE OF THE EVIDENCE, INCLUDING MEDICAL EVIDENCE, THAT THE SUBSEQUENT INJURY AGGRAVATED THE PREEXISTING CONDITION OR PERMANENT PHYSICAL IMPAIRMENT OR THE PREEXISTING CONDITION." (emphasis original).

[18] To the extent that S.C. Code Ann. § 42-9-35 governs "apportionment," it makes clear that an employee with a pre-existing condition is not entitled to any compensation benefits in the absence of proof by expert medical evidence stated to a reasonable degree of medical certainty that the work accident aggravated his pre-existing condition.

S.C. Code Ann. § 42-9-25(A) is clear and unambiguous that all employees with a pre-existing condition are subject to a heightened burden of proof:

> "[t]he employee shall establish by a preponderance of the evidence, including medical evidence that ... the subsequent injury aggravated the pre-existing condition or permanent physical impairment."

When, as here, the "statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). B

Both the Commission and the majority of the Court of Appeals properly applied S.C. Code Ann. § 42-9-35 to the undisputed facts of this case. Therefore, the Respondents respectfully contend that the Court of Appeals did not misconstrue or misapply the plain language and mandatory requirements of S.C. Code Ann. § 42-9-35 to the undisputed facts of this case. The new and unfounded arguments raised by Frampton in his Petition do not merit rehearing or reconsideration

IV. The Court of Appeals properly determined that substantial evidence in the record supports the Commission's finding that the September 4, 2010 accident did not aggravate Frampton's pre-existing neck problem; therefore he is not entitled to any compensation benefits under the Act as a matter of law.

According to the Court of Appeals, the Workers' Compensation Commission's findings of fact regarding Frampton's pre-existing neck problems and his failure to present any medical evidence that the September 4, 2010 dove field incident aggravated those pre-existing problems are supported by substantial evidence in the record. These findings include

- *"Claimant suffered from pre-existing neck pain and right arm numbness prior to his alleged work injury. Most notably, Claimant received treatment with Dr. Bailey, a neurosurgeon, on March 16, 2010, just six months prior to his alleged work injury, when Claimant was prescribed physical therapy, Lortab and Flexeril. (Defendants' Exhibit B). An MRI dated the same showed Claimant had spondylosis, most impressive at C5-6 and C6-7 and bilateral C6 in right grade and left C7 radiculopathy... (Defendants' Exhibit A)."* (R. pp.27—28).
- *"Claimant returned to Dr. Baily on March 15, 2011. Claimant's intake sheet notes Claimant's complaints/problems began on February 20, 2010..."* (R. p.28).
- *"Claimant presented to Dr. Keffer on March 16, 2011 for a nerve conduction study. Claimant reported that his problems had started '14 months earlier', that his neck pain 'gradually began', and that he had these problems 'for years'."* (R. p.28).
- *"I do not find Claimant's testimony to be very credible with regard to the extent of his pre-existing neck condition and his current symptomology."* (R. p.28).
- *"there is no medical evidence stated to a reasonable degree of medical*

certainty that Claimant's September 4, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon." (R. po.28--29).

- *The Claimant's physician, Dr. Bailey, never addressed the issue of whether the alleged accident on September 4, 2010 aggravated the pre-existing neck and right arm condition for which he had previously treated the Claimant and there are no other documents, records of other material that address this issue in the Record of this claim.* (R. p.29).

Frampton did not appeal any of these findings, which the Court of Appeals properly concluded are supported by substantial evidence in the record. In addition, Frampton raises no argument with respect to the substance or foundation of these findings in his Petition for Rehearing. Therefore, there can be no question that the Commission's findings are the law of the case and entitled to preclusive effect in any future proceedings. *See* ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d (1997) (holding that an unchallenged ruling, right or wrong, is the law of the case); Continental Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808 (Ct.App.1997) (stating that a lower court's unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct).

Therefore, as a matter of law, Frampton cannot prove that the neck condition for which he seeks permanent disability compensation is causally-related to the September 4, 2010 dove field incident. As such, even if the Court were to withdraw its opinion and conclude that S.C. Code Ann. § 42-9-35 is inapplicable, Frampton would nonetheless not be entitled to any benefits under S.C. Code Ann. § 42-9-30. Respectfully, this

renders the Petition for Rehearing an exercise in futility and it should be denied because the appellate courts traditionally do not concern themselves with moot or speculative questions. *See* Sloan v. South Carolina Dep't of Transp., 379 S.C. 160, 666 S.E.2d 236 (2008); *see also* Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (holding that an appellate court will not pass judgment on a matter when no actual controversy capable of specific relief exists). Frampton's case is moot because even if the Petition for Rehearing is granted and judgment is rendered in his favor regarding the applicability of S.C. Code Ann. § 42-9-35, it will have no practical legal effect upon his right to relief under S.C. Code Ann. § 42-9-30. Id.

V. The Court of Appeals properly concluded that Frampton failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 based on substantial evidence and not merely by operation of law.

According to Commissioner Taylor,

> "[Frampton] did not meet his burden of proof under S.C. Code Ann. § 42-9-35. The record is clear that he has a history of cervical radiculopathy that predates the September 4, 2010 accident and there is no competent medical evidence that the September 4, 2010 accident aggravated that pre-existing condition. In fact, the records of [Frampton's] treating physician, Dr. Bailey, make no mention of any work-related accident or injury on or about September 4, 2010 and [Frampton's] own statement to Dr. Bailey indicate that his neck problems began in January 2010." (R. p.11 #2).

Frampton's Form 30, Request for Commission Review, makes no mention of these findings or conclusions, Frampton raised no argument with regard to the application of S.C. Code Ann. § 42-9-35 in his brief to the Commission's Appellate Panel, and Frampton otherwise failed to even dispute the issue in his Brief in Reply to the Respondent's appeal to the Appellate Panel. (R. p.41, pp.44—47).

Commissioner Taylor also made a specific finding of fact regarding Frampton's credibility (or rather, *lack thereof*) regarding this seminal issue under S.C. Code Ann. § 42-9-35. According to Commissioner Taylor:

> "I do not find [Frampton's] testimony to be very credible with regard to the extent of his pre-existing neck condition and his current symptomology." (R. p.9 #15).

This finding was likewise not raised in Frampton's appeal, or even disputed before the Commission's Appellate Panel. (R. p.26, p.28 #5).

Because the Frampton failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 and because an award of benefits under the Act must be necessarily predicated on meeting this statutory burden, the Appellate Panel properly concluded that Frampton is not entitled to any additional benefits under the Workers' Compensation Act as a matter of law. Based upon their own view of the greater weight of the evidence in the record, the Appellate Panel went on to find that

> "... [Frampton's] physician, Dr. Bailey, never addressed the issue of whether the alleged accident on September 4, 2010 aggravated the pre-existing neck and right arm condition for which he had previously treated the Claimant and there are no other documents, records of other material that address this issue in the Record of this claim. (R. p.29).

Again, Frampton did not appeal this finding to the Court of Appeals, nor did he dispute the evidentiary basis for this finding in his Brief. He simply argues that S.C. Code Ann. § 42-9-35 does not apply to him.

While the Respondents respectfully contend that "an unappealed ruling, right or wrong, is the law of the case,"[19] both the Commission's Appellate Panel and the Court of Appeals addressed the evidentiary basis for their findings of fact and rulings of law under S.C. Code Ann. § 42-9-35, despite Frampton's failure to preserve this issue for appeal. Therefore, Frampton's contention that he "believes the Court may have misapprehended the application of the application of the law of the case doctrine to create a trap for an unwary party" is without merit.

In fact, the majority Opinion makes no reference to the "law of the case doctrine"[20] or issue preservation generally, but instead reviewed the Commission's

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[19] *See* Atlantic Coast Builders v. Lewis, 398 S.C. 323, 329 (S.C. 2012) (citing Buckner v. Preferred Mut. Ins. Co., 2255 S.C. 159 (1970).

[20] The dissenting opinion of the Court of Appeals does argue that Commissioner Taylor's findings of fact may not be the "law of the case" because "there was no reason for Frampton to appeal the single commissioner's ruling" because this ruling was in his favor. The dissent did not cite any authority for his proposition Moreover, while Commissioner Taylor's *ruling* as to S.C. Code Ann. § 42-9-35 may have been in

findings and conclusions based upon the standard of review set forth by the Administrative Procedures Act. According to the majority Opinion,

> "There is substantial evidence supporting the appellate panel's decision. *See* Gadson, 368 S.C. at 221, 628 S.E.2d at 266 ('Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law.') ... None of Dr. Bailey's medical records mention the dove field incident. This, taken with the fact that Frampton had already seen Dr. Bailey at least six month before the incident for the same injury, is substantial evidence supporting the appellate panel's conclusion ..."

Therefore, the Court of Appeals went beyond the legal ramifications of Frampton's failure to perfect his appeal and concluded that substantial evidence also supports the Appellate Panel's findings of fact on the seminal issue of causation.

Frampton's favor, her *findings of fact* were not, and Frampton had an absolute obligation to seek review of these findings should he desire to not be bound by them. As previously explained by the Court of Appeals in Lindsay v. Lindsay, 328 S.C. Code 329, 491 S.E.2d 583 (1997) – a case cited with approval by the dissent -- when "neither party has challenged certain trial court rulings ... such rulings are the law of the case ... Specifically the trial court's findings ... are unchallenged and are the law of the case." (citing Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993); Dwyer v. Torn Jenkins Realty, *Inc.*, 289 S.C. 118, 344 S.E.2d 886 (Ct.App.1986).

In addition, there is no merit to Frampton's contention that Commissioner Taylor's findings of fact are not "the law of the case" because the "the law of the case rule ...necessarily applies only to appellants." Of course, Frampton did not cite any authority for this bold proposition[21], which is plainly contrary not only to generations of case law, but also to S.C. Code Ann. § 42-17-90, which mandates that the Hearing Commissioner's Order "is conclusive and binding as to all questions of fact" if there is no timely review of these findings. Therefore, it is clear that it is Frampton, and not the majority of the Court of Appeals, that is confused by the concept of issue preservation and additional sustaining grounds.

The Petition for Rehearing discusses at length the liberality afforded respondents to raise "additional *sustaining* grounds" on appeal in accordance with Rule 220(c), S.C.A.C.R., which states "[t]he appellate court may *affirm* any ruling, order decision, or judgment upon any ground(s) appearing in the Record on Appeal." Clearly, the operative word is "affirm." What Frampton now advocates is a policy permitting "reversal" on grounds not raised below and not appearing in the Record.[22] Therefore,

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[21] Frampton does cite Jasper County Board of Education v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990), for the definition of "prevailing party;" however, this case did not deal with issue preservation whatsoever, but instead defined the term in the context of statutory attorney fees. Therefore, the Jasper decision is wholly irrelevant.

[22] South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); Kennedy v. South Carolina Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001).

taken it is logical conclusion, Frampton's argument is that he is not bound by the Hearing Commissioner's findings of fact because they have never been challenged on appeal. Not only is this antithetical to S.C. Code Ann. § 42-17-90 and the entire concept of finality, but also ignores the fact that Frampton has abandoned any challenge to these findings on appeal. *See* Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that an issue not argued in the brief is deemed "abandoned" and will not be considered by the appellate court). Frampton did not challenge Commissioner Taylor's findings before the Appellate Panel[23], he did not challenge them in his Brief to the Court of Appeals, and does not now challenge them in his Petition for Rehearing. Therefore, regardless of whether the Court of Appeals sustained the Commission's findings of fact based on substantial evidence (as stated in the majority opinion), or because no party ever challenged or disputed these findings, the fact remains they are conclusive and binding on the parties pursuant to S.C. Code Ann. 42-17-90.

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[23] In his Briefs to the Commission's Appellate Panel, Frampton made no claim to have satisfied the requirements of S.C. Code Ann. § 42-9-35 – not even in response to the Respondent's appeal expressly raising this very issue. Therefore, his reliance on I'on L.L.C. v. Town of Mt. Pleasant is misplaced, as that case clearly states that "a respondent may abandon an additional sustaining ground under the present rules just as a respondent could under the former ruled by failing to raise it in the appellate brief." 338 S.C. 406, 526 S.E.2d 716 (2000) (citing Maxey v. R.L. Bryan and Co., 295 S.C 334 (Ct. App. 1998); May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986), and Rule 208(b)(1)(B), S.C.A.C.R..

Respectfully, Frampton is no "unwary party," nor has he been "trapped" by the appellate rules as his Petition for Rehearing now suggests. Frampton has utterly failed to present any evidence or argument that could support a finding in his favor under S.C. Code Ann § 42-9-35 at any stage of his workers' compensation claim. Therefore, to the extent that the Commission and the Court of Appeals considered Frampton's utter failure of proof under S.C. Code Ann. § 42-9-35 to be the "law of the case," this remains a correct statement.

VI. The Court of Appeals properly concluded that the Workers' Compensation Commission committed no legal error in applying S.C. Code Ann. § 42-9-35 to the undisputed facts of this claim.

Instead of arguing that he had satisfied the requirements of S.C. Code Ann. § 42-9-35, Frampton argued -- for the first time in his Brief to the Court of Appeals -- that S.C. Code Ann. § 42-9-35 was not timely raised. Though specious, Frampton could have made this argument to the Hearing Commissioner, or perhaps even to the Commission's Appellate Panel, but he did not raise it at all. Therefore, the argument was not properly before the Court on appeal and is not properly before the Court in the Petition for Rehearing. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (internal citations omitted).

Unfortunately, Frampton was apparently not content with raising the timeliness issue for the first time in his Brief to the Court of Appeals. He now raises a new "due process" argument for the first time in his Petition for Rehearing. This is plainly

improper and no "due process" argument is preserved for appeal or properly before the Court of Appeals. *See* Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d (1933) (holding that "[t]he purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this Court a second time.").

Moreover, Frampton's arguments that he was somehow unaware S.C. Code Ann. § 42-9-35 applied to his claim for compensation, or that his right to "due process" was in anyway violated by the Commission's application of S.C. Code Ann. § 42-9-35 to the facts of this case, are specious. Of course, it is a well-established principle "that ignorance of the law is no excuse." State v. Binnarr, 400 S.C. 156, 160 n.7, 733 S.E.2d 890, 892 n.7 (2012).

Furthermore, the Respondents did not obtain Frampton's prior medical records, detailing the extent of his pre-existing injury and treatment, until the eve of the hearing. At the call of the hearing on July 15, 2015, a pre-hearing conference was held with the Commissioner Taylor, at which time the Respondents clearly raised Frampton's burden of proof under S.C. Code Ann. § 42-9-35:

> "It's our position that any injury Mr. Frampton sustained on September 4, 2010, while walking through a dove field was simply a cervical sprain or strain...It is our position that there is no evidence that [Frampton] sustained any additional injury or exacerbated his known pre-existing condition as a result of the September 4, 2010, accident. [Frampton] has a known pre-existing 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. [Frampton] has a burden of proof by a preponderance of the evidence that that pre-existing condition was aggravated or exacerbated. We don't believe he's met that burden of proof." (R. p.7, l.21 – p.8, l.15).

Frampton did not object to this issue being raised at the hearing, nor did Frampton seek an adjournment or postponement to obtain the necessary proof.[24] (R. p.97, lines 13—14; p.99, lines 1—2).

Instead, the issue was tried by implied consent[25] and Frampton was questioned at length about his pre-existing condition and the dearth of evidence supporting any aggravation, both by his own attorney and by the Respondents. (R. p.80, l.20—p.81, l.8;

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[24] While Frampton's current attorney of record may not have been present at the hearing before Commissioner Taylor, Frampton was represented by his counsel who was fully apprised that Frampton was required to prove an aggravation of his pre-existing condition as a pre-requisite to an award of disability compensation. Any claim to the contrary (*i.e.*, that he was unaware of the issue until he received Commissioner Taylor's Decision and Order) is without merit and contrary to the record.

[25] "The rule that a theory must be raised in the pleadings is inapplicable when an issue is tried by consent of the parties, either express or implied." Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA, p.65 (1999). As explained in McCurry v. Keith, 312 S.C. 254, 481 S.E.2d 166 (Ct. App. 1997), where an issue is mentioned in the opening statements and a witness is questioned without objection on that issue, the issue is tried by implied consent even if it should have been pleaded); *see also* Andrews v Von Elten & Walker, Inc., 315 S.C. 199, 432 S.E.2d 500 (Ct. App. 1993) (holding that where the parties and the court discussed an issue at trial without objection, the issue was tried by consent of the parties).

p.30, ll.7—12; p.33, l.20—p.37, l.9; p.42, l.13—p.47, l.4). In addition, Frampton's attorney stipulated to the admission of medical records documenting Frampton's pre-existing condition and the lack of causal-connection to the dove field incident. (R. pp.243—365; pp.258—266). Thereafter, Commissioner Taylor specifically ruled on S.C. Code Ann. § 42-9-35 and Frampton did not object or appeal this ruling or concomitant findings.

The Respondents respectfully contend that arguments that are not preserved for appeal are not the proper basis upon which to grant a rehearing. *See* Arnold v. Carolina Power & Light Co., *supra*. Furthermore, because the Court of Appeals did not misapprehend any argument properly before the Court and otherwise correctly applied the requirements of S.C. Code Ann. § 42-9-35 to the undisputed facts of the claim, Frampton's Petition for Rehearing should be denied.

VII. The Court of Appeals properly rejected Frampton's argument regarding the propriety of the Hearing Commissioner's award under S.C. Code Ann. § 42-9-30, as the Workers' Compensation Commission reversed and vacated this award in its final Decision and Order .

Hearing Commissioner Taylor's award of benefits under S.C. Code Ann. § 42-9-30 was reversed and vacated by the Commission's Appellate Panel. (R. p.27, p.30). Because the Appellate Panel is the "ultimate fact finder and is not bound by the single commissioner's findings of fact," the previous findings of Commissioner Taylor to the contrary, along with her analysis of the issue, are irrelevant. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). In fact, the reversal of Commissioner Taylor's Order leaves it as if it had never been rendered – it is essentially

no longer in effect or existence. Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995). Furthermore, the only appeal to the Court of Appeals lies from the final Decision and Order of the Appellate Panel. S.C. Code Ann. § 42-17-60.

However, even if Commissioner Taylor's *vacated* award of benefits under S.C. Code Ann. § 42-9-30 were properly before the Court on appeal, it is clear that the Court of Appeals misconstrued no argument, nor overlooked any fact in concluding that it was not legal error to consider the fact that Frampton currently earns $102,250.00 per year as the Deputy Director of the Department of Natural Resources and has missed no time from work in denying his claim for permanent and total disability benefits. (R. p.111, lines 16—17, p.9 #13). Specifically, Commissioner Taylor considered these admitted facts in the context of weighing the credibility of Dr. Bailey's opinions on impairment, which included the fallacious statement that Frampton was "unable to return to work." (R. p.183) According to Commissioner Taylor:

> "Based on [Frampton'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 the [Frampton] 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 #14).

Not only is Commissioner Taylor's finding in this regard factually correct and within her discretion to weigh and judge the credibility of the evidence, but Frampton did not even appeal this finding to the Commission's Appellate Panel. (R. p.41, pp.44-

46, pp.60—62). Therefore, it is not a proper basis for granting rehearing by the Court of Appeals. *See* Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d (1933) (holding that "[t]he purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this Court a second time."); *see also* Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (internal citations omitted).

Unfortunately, Frampton was not content to raise this arguement for the first time in his Brief to the Court of Appeals, but he has now expanded the argument regarding the proper calculation of a disability award under S.C. Code Ann.§ 42-9-30 to include new issues raised for the first time in his Petition for Rehearing. Specifically, Frampton now argues that the claim "should be remanded to the Appellate Panel to determine Frampton's permanent partial disability...based on the framework set forth in Clemmons" and "directed to apply the 78% regional cervical spine rating." However, Frampton never raised any such argument in his Brief to the Court of Appeals. While there is a lone reference to Clemmons v Lowe's Home Ctrs., Inc, 420 S.C. 282, 803 S.E.2d 268 (2017), in his Brief at page 16, Frampton does not argue for its application to his own claim, but instead states, "it seems obvious that a claimant's return to work would be considered in determining whether an award of permanent and total disability is appropriate." Therefore, Frampton's new argument regarding Clemmons is not properly before the Court of Appeal in his Petition for Rehearing, which should be denied.

Conclusion

Based upon the foregoing, the Respondents, the South Carolina Department of Natural Resources and the State Accident Fund, respectfully contend that the majority of the Court of Appeals neither overlooked, nor misconstrued, any argument or issue before it and otherwise properly affirmed the final Decision and Order of the South Carolina Workers' Compensation Commission based upon substantial evidence in the record and the applicable law. Therefore, the Respondents respectfully request that the Petition for Rehearing be denied.

Respectfully submitted,

/s/ *Kirsten Leslie Barr*

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June 22, 2020
151\81 \Return to Petition for Rehearing

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
T. Scott Beck, Commissioner

W.C.C. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee,.....Appellant,

v.

SC Department of Natural Resources, Employer, and
South Carolina State Accident Fund, Carrier.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that the above-referenced Appellant, Chisolm Frampton, was served with a copy of the attached Respondents' Return to Appellant's Petition for Rehearing this 22nd day of June, 2020 by emailing and depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to each of the parties of record, as follows:

Stephen B. Samuels, Esq.
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June 22, 2020

s/Kirsten Leslie Barr

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WORKERS' COMPENSATION DEFENSE

Reply to
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June 22, 2020

Via Email to: ctappfilings@sccourts.org and Regular Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Chisolm Frampton v. SC Department of Natural Resources
W.C.C. File No.: 1012533
Appellate Case No.: 2017-001764
Carrier File No.: 2010-3478
Date of Accident: September 4, 2010

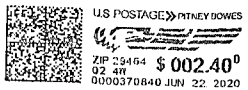
Dear Ms. Kitchings:

Enclosed herewith for filing, please find the original Respondents' Return to Appellant's Petition for Rehearing and original Proof of Service of the same in the above-referenced matter. By a copy of this correspondence, I am serving the other counsel of record with a copy of our Return.

Yours very truly,

s/Kirsten L. Barr
Kirsten L. Barr

KLB/ebw/les
Enc.
cc: Lindsay Sadler, South Carolina State Accident Fund (w/enc.) (email only)
Stephanie Welch, SC Department of Natural Resources (w/enc.) (email only)
John C. Land, III, Esq. (w/enc.) (email/mail)
Stephen B. Samuels, Esq. (w/enc.) (email/mail)



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The Honorable Jenny Abbott Kitchings
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P. O. Box 11629
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