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.

## REPLY TO RETURN TO PETITION FOR REHEARING

Appellant, by and through his undersigned attorneys, hereby files this Reply to Return to Petition for Rehearing.

## ARGUMENT

**1. The Court erred in concluding DNR did not admit liability for permanent disability based on the mistaken belief that Respondents neither paid compensation nor paid for the neck surgery on which Frampton's impairment rating was based [In Reply to Respondents' argument at pages 9-15].**

In their Return, Respondents allege they neither paid compensation nor provided medical treatment beyond the initial two visits with Doctor's Care immediately after the accident. They further argue that, because they deny ever accepting liability, Frampton is not entitled to medical

treatment, temporary compensation or permanent partial disability compensation.

A. Respondents admitted liability for the claim by paying compensation and the surgical procedure on which the impairment rating was based.

In their Return, Respondents begin their argument with a lengthy Statement of the Case. To a large extent, this is a rehash of the Statement of the Case in their Brief. However, there are some telling differences.

After describing the accident and first two visits to Doctors' Care on September 7th and 17th, Respondents state:

> 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. [Return to Petition for Rehearing, page 2].

Respondents then jump ahead to four years later when "Frampton filed a Form 50 claiming additional benefits under the Workers' Compensation Act on November 18, 2014." [Return to Petition for Rehearing, page 2].

Respondents simply omit the events between the September 2010 filing of the Form 19 denying the case up until Frampton filed for a hearing in November 2014. Respondents would have the court believe these events are unimportant, implying that Frampton never challenged the supposed "denial" of his case nor requested any benefits under the Act until four years had passed since his claim had been administratively closed.

As the Court now understands – having received additional evidence from both parties[1] –

[1]Appellant recognizes that the Court has not ruled on the initial motion to supplement the record. As both parties have now filed additional evidence with the Court (rather than merely designating the evidence sought to admitted), the ruling is rendered moot as a *fait accompli*. Appellant requests that the Court grant the Motion and that all exhibits filed be made part of the Record on Appeal.

Respondents reversed their initial denial and reopened Frampton's case on July 8, 2011. They then filed a Form 15 reporting payment of compensation. Based on the Form 15, the Commission entered the notation "Temp. Comp. Award Started" on July 8, 2011. [Return to Motion to Supplement Record on Appeal, Exhibit 2, pages 6-7]. On July 29, 2011, Respondents filed a Form 17 in which the Employer's Representative acknowledged Frampton "was disabled for the period(s) indicated and [he] was paid compensation as shown above." [Reply to Return to Motion to Supplement Record on Appeal, Exhibit 4]. On August 16, 2011, Respondents paid $17,448.79 to Roper St. Francis Hospital for Frampton's cervical fusion operation. [Reply to Return to Motion to Supplement Record on Appeal, Exhibit 3]. These actions by DNR and the Fund confirm that the case had been fully accepted and that liability for *some* permanent disability had been fully admitted.

Respondents touch on the reopening of Frampton's case on July 8, 2011 in a footnote. In the footnote, Respondents allege "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." [Return to Petition for Rehearing, page 2 n.1]. This allegation is misleading, as the Form 15 filed by Respondents states"disability began on 03-21-2011 and the date of first payment was 03-21-2011."[2]

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[2]The "Agreement as to Compensation" is governed by § 42-17-10. The section provides that:

> [i]f . . the employer and the injured employee . . . reach an agreement in regard to compensation under this title, a memorandum of the agreement in the form prescribed by the Commission, accompanied by a full and complete medical report shall be filed with the Commission within fifteen days after agreement has been reached by the parties for approval of the Commission; otherwise, such agreement shall be voidable by the employee or his dependents. . . . S.C. Code Ann. § 42-17-10 (2017.

The "form prescribed by the Commission" has always been the Form 15.

DNR paid salary in lieu of compensation, the payment of which was reported to the Commission on the Form 15, Form 17 and Periodic Reports (Forms 18). Respondents continued to file Periodic Reports with the Commission throughout this case, which would not be done if the claim were denied and the file closed. [Reply to Return to Motion to Supplement Record on Appeal, Exhibit 4].

Despite the evidence to the contrary, Respondents persist in claiming they neither paid compensation nor paid for Frampton's neck surgery. Their repeated assertion that Frampton's health insurance paid for his surgery, while literally true, is misleading.

The issue of whether Respondents paid compensation and then paid for the surgery is *the* critical issue in this appeal. If it were true "that the September 4, 2010 dove field incident caused nothing more than a 'strain' injury that quickly resolved," then Respondents would and should have prevailed in this litigation.[3] [Return to Petition for Rehearing, page 3]. The problem for

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See, Lowther v. Standard Oil Co. of New Jersey, 206 S.C. 286, 33 S.E.2d 889 (1945). The Form 15 has *always* been binding on the employer. Section 42-17-10 specifically states that the Form 15 "shall be *voidable by the employee*" if not filed with the Commission by the employer. S.C. Code Ann. § 42-17-10 (2007)(emphasis added). It is the signature of the employer's representative that creates the binding effect; not later action by the Commission.

Over the years, the appellate courts have consistently confirmed that an agreement to pay compensation is irrevocable and binding on the employer. In Allen v. Benson Outdoor Advertising Company, the court held: "The question of whether claimant sustained an injury by accident... was finally adjudicated by the agreement as to compensation which was duly approved by the Industrial Commission and formal award entered thereon. Appellants cannot now retry the basic issue of liability." Allen, 236 S.C. 22, 112 S.E. 2d 722, 723 (1960).

[3]To be clear, the statement that Respondents should prevail if their allegations were true neither presumes nor accepts that they are true. If DNR is truly allowed to repudiate their acceptance of this case – even after the falsity of the underlying premise has been proven – then the case should be remanded for a *de novo* hearing with Appellant given leave to obtain proof of the aggravation from Dr. Bailey. See

Respondents is that their argument rests entirely on the premise that they never paid for compensation and surgery. Once they admit – or it is shown – that the underlying premise is false, then their entire case evaporates. Appellant need not adduce medical proof of an aggravation to satisfy § 42-9-35 (assuming the statute even creates such a requirement) because the causal connection is satisfied by the affirmative acceptance of liability for the disability resulting from the surgery. This is why Appellants doggedly persist in advancing a narrative that can no longer be sustained.

B. Respondents' admission of liability allowed Frampton to proceed with proof of disability without additional proof of an aggravation of a preexisting condition.

Respondents reject as a "gross misapprehension" the well established maxim that "Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." Curiel v. Env. Management Services, 655 S.E.2d 482, 376 S.C. 23 (2007). Respondents go on to argue that "[w]hat 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." [Return to Petition for Rehearing, page 10].

The second statement is a correct one, as are other statements of law made by Respondents.

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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).

To receive temporary compensation, an injured worker must prove he has a temporary loss of wage-earning capacity To receive medical treatment, he must prove that he needs medical treatment which will tend to lessen his period of disability. And, "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." [Return to Petition for Rehearing, pages 10-11].

Respondents argument breaks down in the very next paragraph when they state: "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.*" [Return to Petition for Rehearing, page 11]. The fatal flaw is that they *did* admit liability for benefits without the necessity of a hearing.

Respondents make an additional statement of law which is not correct – at least not in the context of an admitted case. To their previous list, Respondents add "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." [Return to Petition for Rehearing, page 11].

It has long been black letter law that "[a] work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is compensable. See, e.g. 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); Hargrove v. Titan Textile Co., 360 S.C. 276, 295, 599 S.E.2d 604, 613-14 (Ct. App. 2004); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct.App.1995). "It is no defense that the accident, standing alone, would not have caused the claimant's condition,

because the employer takes the employee as it finds him or her." Mullinax, 318 S.C. at 437, 458 S.E.2d at 80.

When DNR belatedly accepted Chisolm's claim and provided benefits, they necessarily accepted that any preexisting condition was aggravated. Even now, Respondents admit Frampton's "claim met the requirements of S.C. Code Ann. § 42-1-160 . . ." [Brief of Respondents, page 8].

Respondents do go on to argue that "the Appellant's burden of proof under S.C. Code Ann. § 42-9-35 is not eliminated, as these are separate statutes governing separate issues." [Brief of Respondents, page 8]. They are indeed separate – their separation into different sections of the statute supports Appellants' argument that § 42-9-35 is not a separate requirement in an *admitted* case. Or put another way, the requirement is met *ipso facto* when the employer accepts the case and pays benefits consistent with a proven aggravation.

Consider the result in the instant case. After reversing its initial denial, DNR paid compensation and paid for treatment, including surgery. Dr. Bailey, the physician "authorized by the Employer/Carrier to treat this Claimant for his or her injury by accident," assigned a 26% whole person/78% regional cervical impairment rating. [R.P. 183-184]. At that point – like every other injured worker who undergoes back surgery from an authorized physician as a result of a work-related injury – Frampton proved his right to compensation for permanent partial disability to the back under § 42-9-30.

Would a similarly situated employee with no preexisting condition be entitled to partial disability compensation? The answer is obviously yes. Why then should Frampton have to produce separate proof *at the end of the case?* If a preexisting condition is a barrier to compensation, then it would also be a barrier to the underlying compensability of the case. If he has to prove the

aggravation, then he should prove it at the beginning; not the end.

Here, he proved the aggravation as a predicate to receiving compensation and surgery. Consider the pre-accident visit to Dr. Bailey on March 16, 2010. After reviewing an MRI, Dr. Bailey opined "I think that conservative management would still be appropriate." He ordered physical therapy and prescribed medication. He gave no consideration whatsoever to surgery. [R.P. 245-246].

Nearly a year later to the day on March 15, 2011, Frampton returned to Dr. Bailey after suffering a work accident on September 4, 2010. Dr. Bailey recorded his "symptoms have progressed from the study that was done approximately a year ago." He ordered a repeat MRI scan along with EMG and nerve conduction studies, after which "we will decide whether surgical intervention would be the next course of action." [R.P. 166]. After reviewing the second MRI, Dr. Bailey operated six days later on March 21, 2011. It cannot be gainsaid that Dr. Bailey operated because Frampton was decidedly worse after the work accident.

DNR knew this. They had access to Dr. Bailey's records in July 2011 when they reversed course and accepted the claim. They read the March 2011 report disclosing the previous MRI and preexisting symptoms. They accepted the claim and paid for the surgery with their eyes wide open. Had Frampton not proven an aggravation of a preexisting condition, they would not taken any of these steps.

Frampton had a preexisting condition. He had no preexisting impairment or disability. He was under no work restrictions and needed, at most, conservative management. After the work injury, he underwent a substantial two-level fusion to his cervical spine resulting in a very considerable impairment rating.

At trial, there were three issues raised in the pleadings: (1) extent of disability; (2) whether

his arms were affected; and (3) whether the 2011 car accident was an intervening accident. As temporary compensation and the surgery resulting in the impairment rating were willingly paid for by DNR when they reopened the claim, Frampton has proven his right to receive a disability award under § 42-9-30. By accepting the case, Respondents have admitted all elements of his claim. He need only prove the *degree* of disability. He lost the issue on his arms being affected and did not appeal it. Respondents lost on the intervening accident issue and did not appeal.

The sole remaining issue on the continuum is the extent of disability (along with limited post-MMI medical care awarded by the Single Commissioner). For the reasons stated herein, the Court should reconsider its decision and remand to the Commission for a determination of permanent partial disability pursuant to § 42-9-30 and Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017).

**2. Appellants misapprehend Frampton's argument as to the meaning of an "accepted" case [In Reply to Respondents' Arguments at pages 15-20].**

Appellants make a legal argument to counter the fact that this is an accepted case. Appellants seek to recast Respondents' positions as an "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." [Return to Petition for Rehearing, pages 15-16].

To begin with, Appellant has consistently argued that this is an accepted case. In his briefs to the Appellate Panel, Frampton argued: "This is an admitted claim accepted by the Director of the State Accident Fund, Mr. Harry Gregory , and benefits were accordingly provided to the injured worker, Chisolm Frampton." [R. P. 45, 61]. He elaborated that "The argument of the [Respondents] comes too late inasmuch as [Respondents] *have accepted the claim* and now the question is should

additional benefits be paid to the Injured Worker for permanent disability and loss of use of the spine." [R. P. 61]. At oral argument before the Appellate Panel, Frampton argued: "This is an accepted case. How many times do you have to prove an accepted case?" [R. P. 146, lines 21-22].

The same theme appears throughout Frampton's briefs to this Court. [Brief of Appellant, pages 6-10; Reply Brief, pages 1-3].

By the same token, "Respondents consistently argued that the alleged events of September 4, 2010 caused nothing more than a cervical sprain or strain injury that quickly resolved." [Brief of Respondents, page 2; R. P. 37-40; p. 70, line 20-p. 71, line 3]. Respondents described the first issue on appeal as "Does the Appellant wrongly assert that the Respondents admitted 'liability' for benefits under the Workers' Compensation Act?" [Brief of Respondents, page 1].

Respondents argue that the application of § 42-9-260 is unpreserved, "wholly without merit" and "frivolous." To the contrary, this is not a wholly new argument. "A petition for rehearing must show points supposedly overlooked or misapprehended by the court. Its purpose is not to present points the lawyers of losing parties overlooked themselves or to have the case tried in the Court of Appeals a second time." Checker Yellow Cab Co., Inc. v. Checker Cab and Parcel Service, Inc., 340 S.E.2d 549, 287 S.C. 608 (S.C. App. 1985).

The meaning and significance of an *accepted case* is central to this appeal and has been from the outset. Although a party cannot raise a new issue on appeal nor argue an issue on a different ground than at trial, that is now what is happening here. This is the same argument on the same issue – it has merely expanded in sophistication and complexity *as a necessary response* to the misapprehension of the Court as to the what it means when a case is "accepted" or "admitted.

Respondents are correct that § 42-9-260 was not mentioned by its specific statute number in

the previous arguments.[4] There was no need to mention it at trial because, as the Single Commissioner found, Respondents "admitted the claim and provided medical treatment." [R. P. 7, Finding of Fact 7]. The statute became relevant on appeal when this Court held "DNR's *initial* provision of treatment for Frampton's injury does not estop it from later contesting liability under these circumstances." As discussed in the Petition for Rehearing, the Court apparently based this holding on the mistaken belief that DNR had only paid for the first two Doctor's Care visits. The Court was mislead by Respondents' repeated allegation that Frampton's "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].

As Respondents' allegation has now been exposed as literally true but misleading, the case must be viewed in a different light.[5] The Court is required to consider the case based on the true

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[4]The observant reader may also note that § 42-9-35 was not mentioned at trial either.

[5]In a footnote, Respondents argue "Frampton's "unclean hands" should bar him from raising any such equitable argument [of estoppel and waiver]. [Return to Petition for Rehearing, pages 19 n.11]. It should not be lost on the Court that Respondents make this accusation on the heels of actively misrepresenting the fact that they paid for Frampton's surgery. It appears this is a circumstance where "The lady doth protest too much, methinks." William Shakespeare, Hamlet, Act III, Scene II (1603).

Respondents note that the Single Commissioner found "I do not find Claimant's testimony to be very credible with regard to the extent of his pre-existing neck conditions and his current symptomology." [R.p. 28]. Appellant acknowledges this finding and did not appeal it. On cross-examination, Frampton testified "I do not recall" seeking treatment with Dr. Bailey for neck pain and right arm numbness. However, when pressed as to whether "Do you deny it?", he responded "No." He added "If Dr. Bailey has that in his reports, I'm not going to dispute that." [R.p. 96, lines 5-21]. While this testimony may not have been completely credible in the commissioner's eyes, it does not rise to the level of a deliberate effort to mislead the court nor did it result in prejudice to Appellants. Furthermore, the Commission did find other parts of Frampton's testimony to be credible, specifically finding "his testimony admitting the possibility of an error . . . support[s] Claimant's allegations

facts. This is no longer a case where the evidence shows the employer paid for "some treatment" at the outset, but thereafter denied the serious of the injury and specifically denied that the cervical fusion surgery was causally connected to the work injury. It is now a case where the employer admitted the seriousness of the injury by paying for a cervical fusion surgery and asking the authorized treating physician to provide an impairment rating for that surgery. Furthermore, it is now a case where the employer filed reports with the Commission admitting the claim and reporting that it paid for the surgery *and* paid salary in lieu of compensation. [Reply to Return to Motion to Supplement Record on Appeal, Exhibit 4].

Appellant raised § 42-9-260 because it is necessary for the Court to fully understand the legal

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of a September 4, 2010 work accident." [R.P. 7, Finding of Fact 2]. Neither of these credibility findings are material as to whether Respondents accepted the claim, paid compensation and paid for the surgery. See Crane v. Raber's Discount Tire Rack, Op. No. 27951 (S.C. Sup. 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."

The cases cited by Respondents *are* relevant – just not for the purpose they seek to employ them. As Respondents state, the doctrine of unclean hands "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." Precision Instrument Mfg. V. Automotive Co., 324 U.S. 806, 814 (1945). If Respondents had made an honest mistake and truly believed they had not paid for the surgery (nor paid salary in lieu of compensation), then once the truth was uncovered, they still had the opportunity to admit their error. That they chose not to, instead doubling down on demonstratively false and misleading statements, means the statements were not accidental. The statements must have been deliberately calculated to give the Court a false impression of the facts and gain an unfair advantage in this litigation. "If one remains silent where in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent." Smith v. Williams, 141 S.C. 265, 282, 139 S.E. 625, 630 (1927). Cf. State v. Wills, 409 S.C. 183, 762 S.E.2d 3 (2014)(Beatty, C.J. dissenting)("More importantly, a decision authorizing the State to present a false statement to the jury in order to procure a conviction should not stand as it unquestionably compromises the integrity of our system of justice.").

significance of an *accepted* claim. It is not the mere fact DNR paid for "some treatment." It is the fact DNR paid for the cervical fusion surgery and, most importantly under § 42-9-260, that DNR paid *salary in lieu of compensation.* DNR is not only bound by reporting these payments to the Commission as an admission of liability under the Act. It is precluded as a matter of law by now denying liability in a case in which compensation was willingly paid *in reference to the Act* after the 150 day statute of limitations. See S.C. Code 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.").

Having established that Respondents indeed accepted the case – both as a matter of fact and as a matter of law – the question raised by Respondents is whether that acceptance "effectively eliminates Frampton's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35." [Return to Petition for Rehearing, pages 15-16]. As to § 42-9-30, it does not. Frampton still had to prove that he suffered permanent impairment and resulting disability as a result of his injury. This was proven by the impairment ratings provided by Dr. Bailey, along with Frampton's testimony as to his pain and limitations. See Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 ( 2017) "[T]here is no evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back. Every doctor and medical professional who assigned an AMA Guides impairment rating indicated Clemmons lost more than seventy percent of the use of his back . . .").

As to § 42-9-35, that is a different matter entirely. Frampton proved the aggravation of a preexisting condition when DNR reopened his case and paid for his cervical fusion. If he had not required surgery due to the aggravation of his preexisting condition, then DNR obviously would not have conceded this fact by accepting his case. He is not required to reprove an established fact. Cf.

Deskins v. Boltin, 454 S.E.2d 322, 317 S.C. 310 (Ct. App. 1994)("A concession of a fact ordinarily has the force and effect of an established fact.").

Frampton met his burden of proof because this was an accepted case. As such, the Court should grant the Petition for Rehearing, reverse the decision below, and remand the case for a determination of permanent partial disability pursuant to § 42-9-30 and Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017).

**3. 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 [In Reply to Respondents' Arguments at pages 20-24].**

In his Petition for Rehearing, Appellant explained in detail how § 42-9-35 fits into the overall statutory scheme of the Workers' Compensation Act. Section 42-9-35 must be read in context with the elimination of the Second Injury Fund and the amendments to §§ 42-9-150, 160 and 170. It must also be understood – as is obvious from its plain language – as a legislative reversal of the *combined effects* doctrine adopted in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006). This simple analysis shows that § 42-9-35 was intended to preserve the rights of a claimant with a preexisting condition to "*receive further benefits* as provided under the provisions of Section 42-9-35." S.C. Code Ann. § 42-9-170(B) (2007)(emphasis added). It was not intended and cannot be construed to narrow a claimant's rights nor to create unreasonable burdens. "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010), *quoting* Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945).

Respondents do not directly address this analysis. They begin by referring to various statutes

with burdens of proof. No one disputes that the employee must prove an injury by accident (including an aggravation of a pre-existing condition) under § 42-1-160; further medical treatment under § 42-15-60; temporary compensation under § 42-9-260; and permanent partial disability under § 42-9-30. Respondents made this point earlier in their return, where they also state "in some claims the employer admits liability for benefits without the necessity of a hearing . . ." [Return to Petition for Rehearing, page 11]." While Respondents disclaim their admission of liability, the fact is they admitted (1) Chisolm suffered an injury by accident aggravating a pre-existing condition; (2) he needed medical treatment (cervical fusion surgery) to lessen his period of disability; and (3) his injury entitled him to receive temporary total disability compensation from DNR for six weeks. These benefits were willingly provided by Respondents.

Respondents argue that § 42-9-35 creates a new entirely separate burden of proof on all injured workers with preexisting conditions. And if such specific proof is not adduced *even at the end of an admitted case*, then the Claimant is barred from receiving *any* compensation for permanent disability. Under their interpretation, even an employee who undergoes cervical fusion surgery *as a direct result of his work injury* is barred from compensation. For a system designed "to avoid any incongruous or harsh results," this callous construction is strikingly out of place.[6]

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[6]"Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and 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)

The cardinal rule of statutory interpretation is to determine the intent of the legislature. University of Southern Cal. v. Moran, 617 S.E.2d 135, 365 S.C. 270 ( 2005). When dealing with a complex set of interrelated code sections, the various sections must be read in harmony to effectuate the intent of the legislature and avoid a result inconsistent with the legislative intent. A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co., 363 S.C. 612, 611 S.E.2d 297 (Ct.App.2005).

Legislative enactments do not happen in a vacuum. "[T]here is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." Cowan v. Allstate Ins. Co., 351 S.C. 626, 571 S.E.2d 715 (Ct. App. 2002).[7]

The first paragraph of § 42-9-35 states:

> The employee shall establish by a preponderance of the evidence, including medical evidence, that:
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> (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
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> (2) the preexisting condition or the permanent physical impairment aggravates the

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[7]Counsel for Respondents cites her service on the Governor's Task Force on Workers' Compensation Reform. One might note that one of Frampton's attorneys actually served in the Senate which debated and enacted the 2007 amendments to the Act. Regardless, the personal knowledge and experience of the attorneys in this case is not relevant nor is the report from the Governor's Task Force.

The Governor's Task Force issued its report in 2005 – two years before the Legislature amended the Act. As with any ad hoc group created within the executive branch, the Governor's Task Force had no legislative or lawmaking authority. At best, it was designed to mobilize public opinion to persuade the legislature to pass legislation consistent with the political aims of the executive.

subsequent injury.

S.C. Code Ann. § 42-9-35 (A)(2007).

Nowhere in this section does it say: "An employee with a preexisting condition must prove aggravation of a preexisting condition as a prerequisite to receiving an award under § 42-9-30." Surely if that was the purpose of the statute, it would say as much in plain language. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000)(courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention).

This first paragraph is exactly the opposite of the holding in Ellison. Ellison held: "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). Section 42-9-35 explicitly reversed this holding using virtually identical language.

One other aspect is telling. The preexisting condition referred to in Ellison need not be to the injured body part. Ellison injured his leg. His pre-existing physical conditions included "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. The same definition presumably applies to § 42-9-35. As such, if the employee is able to show that either the preexisting condition (which could be entirely unrelated to the injured body part) aggravates the work injury or is aggravated by the work injury, then he is able to "obtain other benefits in addition to those provided for in Section 42-9-30 (meaning he is able to proceed

under the economic model set forth in § 42-9-10 and 42-9-20).

The second paragraph of § 42-9-35 begins:

> The commission may 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).

Frampton had no permanent physical condition. He did have a nondisabling preexisting condition. Most importantly, he "incur[red] a subsequent disability from an injury arising out of and in the course of his employment." Id. Nowhere in the statute does it state he must prove an aggravation to recover compensation for the *subsequent disability*. What the statute does state is that the "commission may award compensation benefits . . . for the resulting disability of the permanent physical impairment or preexisting condition ***and*** the subsequent injury." Id. (emphasis added).

If we assume *arguendo* that Frampton did not prove the aggravation, he is nonetheless entitled to compensation for the subsequent injury. Without proof of the aggravation, he is not entitled to receive compensation for the preexisting condition.[8] This is the only reading that makes sense, for otherwise what would be the purpose of requiring proof that the preexisting condition affect the subsequent injury, let alone considering a comorbidity like diabetes to be a preexisting condition?

This analysis is confirmed when one considers the amendments to the companion code

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[8]As a practical matter, his preexisting condition did not result in any definable impairment or disability. It would be impossible to apportion the disability award without resorting to speculation or conjecture. See, e.g. Hutson v. S.C. Ports Auth., 399 S.C. 381, 732 S.E.2d 500 (2012)(an award may not rest upon surmise, conjecture, or speculation).

sections. Those sections reference impairment or disability from an injury in the same or previous employment. As amended in 2007, § 42-9-150 contains the provision that:

> he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed, except that such employee may receive further benefits if his subsequent injury qualifies for additional benefits under Section 42-9-35.

S.C. Code Ann. §§ 42-9-150 (2007).

Section 42-9-170 states: "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 (2007).

These code sections provide that compensation is limited to disability arising out of the subsequent injury. If an injured worker had a 5% impairment rating for a previous disability or injury and a 10% impairment rating for the subsequent injury, then the award would be limited to disability with reference to the 10% impairment rating. The preexisting 5% would be disregarded *unless* he proved "the subsequent injury aggravated the preexisting condition or permanent physical impairment. S.C. Code Ann. § 42-9-35 (A)(2007).

Further explanation is provided in § 42-9-35 (B):

> However, if the subsequent injury is limited to a single body part or member scheduled in Section 42-9-30, except for total disability to the back as provided in Section 42-9-30(21), *the subsequent injury must impair or affect another body part or system* in order to obtain benefits in addition to those provided for in Section 42-9-30.

Id.

This sentence confirms that proof of the aggravation of another body part or system is designed to allow a claimant to obtain additional benefits – not to preclude him from *any* disability compensation whatsoever. It merely reverses Ellison and codifies the two-body part rule from

Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)( "Where 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.").

As to the instant case, Frampton proved that the subsequent injury resulted in cervical spine surgery and a regional cervical spine impairment rating of 78%. [R.p. 183-184]. At a minimum, he is entitled to compensation for that disability less any permanent impairment from the preexisting condition. Given that Respondents admitted the claim and paid for the surgery, an aggravation of the preexisting condition should be deemed to be admitted. Even if it is not, then under the principles of statutory construction, § 42-9-35 should not be read to bar him from compensation altogether. That would be an absurd result completely inconsistent with the liberal construction to be given the Act.

Therefore, Appellant requests the Court reconsider its decision and remand to the Commission for a determination of permanent partial disability pursuant to § 42-9-30 and Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017).

**4. The mere fact a claimant has a nondisabling preexisting condition does not bar him from receiving an award under § 42-9-30 [In Reply to Respondents' Arguments at pages 25-28].**

Respondents argue Frampton is barred from receiving compensation under § 42-9-30 because the Commission found as fact that Frampton presented "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 condition . . ." [Return to Petition for Rehearing, pages 26-27]. Respondent acknowledges the Commission made these findings and they are supported by

substantial evidence.[9]

The dispute lies in the legal significance of these findings. Respondents argue:

> 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.

[Return to Petition for Rehearing, page 27].

This leap of logic is a bridge too far. Respondents are essentially arguing that an employer can bar compensation at the end of an *accepted* case even when the *employer* obtains proof of disability from the physician it authorized to provide surgery and impairment ratings. This goes well beyond the draconian result below, veering into chaos. "This kind of arbitrary outcome is not in accord with the purpose of our Workers' Compensation Act." James v. Anne's Inc., 701 S.E.2d 730, 390 S.C. 188 ( 2010)(workers' compensation commission should construe the Act " in order to secure its humane objectives.").

The Commission's findings on aggravation have no bearing on whether Frampton is entitled to permanent partial disability compensation under § 42-9-30. Despite Respondents' repeated assertions to the contrary, the evidence conclusively shows that DNR accepted this case. See Jervey v. Martint Envtl., Inc., 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012), *affirmed in part and vacated in part*, 406 S.C. 210, 750 S.E.2d 90 (2013)(doctrines of waiver and laches prohibited employer from asserting compensability defense 450 days after notice of accident). The sole basis for denying compensation is the legally incorrect application of § 42-9-35. Once this error is corrected, the

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[9]Appellant would note that Dr. Bailey concluded Frampton's condition had worsened to the point where he required surgery whereas before the accident he only required physical therapy. Appellant did not develop this evidence further because DNR admitted the case and paid for the surgery. The Single Commissioner agreed.

Commission is legally required to award permanent partial disability compensation based on the evidence of disability in the record.

**5. The law of the case doctrine does not bar Frampton's ability to recover under § 42-9-30 because the fact Respondents admitted the claim and provide medical treatment obviates the need to reprove an aggravation of a preexisting condition [In Reply to Respondents' Arguments at pages 28-34].**

Respondents argue:

> Because 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 necessarily be 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.

[Return to Petition for Rehearing, page 29].

Their real focus is to address the dissenting opinion from Judge Lockemy. The dissent would have held:

> 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. Without expressly addressing this finding, the appellate panel relied on the law of the case doctrine to affirm the single commissioner's conclusion that Frampton failed to satisfy his burden of proof under section 42-9-35. However, 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.

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 stated by the dissent, the Single Commissioner found DNR admitted the claim, thus obviating the need to reprove the aggravation. This truly should be the end of the inquiry. The law does not require a party to perform a useless act. Once the Single Commissioner ruled in Frampton's favor on the dispositive issue, he was not required to appeal at all.

The Appellate Panel erred in applying the law of the case doctrine. The full text of the Single

Commissioner's finding states:

> I find 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. *Nevertheless, Defendants admitted the claim and provided medical treatment.*

[R. P. 7, Find of Fact 7 (emphasis added)].

The Appellate Panel adopted the first part of this finding, but deleted the portion finding that "Defendants admitted the claim and provided medical treatment." The panel then stated "This finding, which is supported by the greater weight of the evidence, was not appealed and is affirmed as the law of the case." [R.p. pages 28-29, Finding of Fact 6].

To hold that this new finding – completely changing the meaning and impact of the Single Commissioner's finding – cannot be appealed is, respectfully, an erroneous application of the law of the case doctrine. Although the majority did not directly address the law of the case doctrine, it is implicit in the holding – thus the reason the dissent discusses it. Furthermore, the majority opinion sets out in the procedural history that "the appellate panel found the single commissioner correctly determined Frampton did not meet his burden of proof under § 42-9-35, that finding was the law of the case, and Frampton was therefore not entitled to disability benefits.

Respondents reframe this legal issue as a simple factual dispute involving substantial evidence. Even though the Commission included its ruling on a law of the case in its factual findings, it does not change the reality that this was a conclusion of law. An error of law can be reversed by this Court. See, e.g., James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010).

The Court should reconsider its decision, hold the law of the case doctrine does not apply, and remand the case to the Commission for a determination of permanent partial disability pursuant to § 42-9-30 and Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017).

## 6. Appellant timely raised the misapplication of § 42-9-35 at the first opportunity [In Reply to Respondents' Arguments at pages 34-37].

Respondents argue that Appellant's "specious" argument concerning the misapplication of § 42-9-35 was not timely raised because "Frampton could have made this argument to the Hearing Commissioner, or perhaps even to the Appellate Panel, but he did not raise it at all." [Return to Petition for Rehearing, page 34]. Frampton obviously could not raise any objection to § 42-9-35 before the Hearing Commissioner because neither party raised it. It only became an issue in the case when the Single Commissioner *sua sponte* made findings of fact on it in her order.

As to raising it to the Appellate Panel, it was not relevant then either because the Single Commissioner ruled any purported failure to satisfy § 42-9-35 was trumped by the fact DNR accepted the case. The code section became the dispositive issue in the case when the Appellate Panel issued its order. From that point forward, Frampton has continually argued that the Appellate Panel misinterpreted and misapplied the statute.

Respondents then go on to claim that they "did not obtain Frampton's prior medical records, detailing the extent of his pre-existing injury and treatment, until the eve of the hearing." [Return to Petition for Rehearing, page 35]. Even if that is true, it does not mean that Respondents were unaware of Frampton's preexisting condition when they reopened his case and paid for his cervical fusion surgery.

DNR necessarily had the records from Dr. Bailey for treatment after the work accident. They knew Dr. Bailey had previously treated Frampton because the March 14, 2011 report stated "symptoms have progressed from the study that was done *approximately a year ago*." They read the report where Dr. Bailey ordered a repeat MRI scan along with EMG and nerve conduction studies,

after which "we will decide whether surgical intervention would be the next course of action." [R.P. 166]. Then knew Dr. Bailey operated six days later. Only after reading this records, did they reverse course, accept the claim, and pay for the surgery. They cannot claim surprise. See McGaha v. Mosley, 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984)(when party has knowledge of facts well in advance of trial there is nothing to substantiate a claim of unfair surprise). The only party with justification to claim unfair surprise at trial is Frampton.

Respondents argue the issue of § 42-9-35 was tried by consent. Generally, a party seeking to try an issue outside the pleadings is required to move to amend his pleadings or obtain the express consent of the opposing party. Amendments to the pleadings are desirable because they bring the pleadings in line with issues actually developed at the trial. Neither was done here.

The issue then is whether the § 42-9-35 issue was tried by implied consent. Implied consent depends on whether the parties recognized an issue not raised by the pleadings entered the case during the trial. Sunvillas Homeowners Ass'n, Inc. v. Square D Co., 301 S.C. 330, 391 S.E.2d 868 (Ct. App. 1990). A party can be deemed to consent to trial on new issues by a failure to object to evidence on the new issue. However, the party must be able to recognize that the evidence concerns a new issue. There is no "implied consent . . . when the evidence that is claimed to show trial by consent is relevant to the issue already in the case as well as the issue sought to be added by amendment. . . . [T]his view is sound because the opposing party may not be conscious of the relevance of the evidence to issues not raised by the pleadings if that matter is not made clear. Id. at 335, 871.

The admission of Frampton's pre-accident medical records was not obviously related to § 42-9-35. They were equally relevant to issues already in the case, specifically the degree to which

Frampton's subsequent accident contributed to his resulting disability. The sole purpose for which they were actually used at trial was to impeach Frampton's credibility "with his own medical records." [Return to Petition for Rehearing, page 19 n.11]. Given that the case was accepted and that § 42-9-35 was never raised as a defense in the pleadings (nor at trial), Frampton reasonably could not have recognized that Respondents were using this seemingly inconsequential evidence to support a complete change in their position.

In the event, this was extraordinarily prejudicial. See Staubes v. City of Folly Beach , 339 S.C. 406, 529 S.E.2d 543 (2000) (prejudice envisioned by Rule 15(b) is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it). Had Frampton been on notice of a failure in his proof, he had the option of moving for a continuance to obtain the necessary proof. See. 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).

Appellant timely raised the § 42-9-35 issue in this appeal. Therefore, the Court should reconsider its opinion, reverse and remand to the Commission for a determination of disability.

**7. Although Appellant believes the Court erred in its analysis of the Single Commissioner's award, the issue was properly before the Court [In Reply to Respondents' Arguments at pages 37-39].**

Putting aside Respondents argument that the Court should never have addressed the Single Commissioner's award, Appellant must address the argument that "Frampton did not even appeal this finding to the Commission's Appellate Panel." [Return to Petition for Rehearing, page 38].

In his Form 30 (Notice of Appeal), Frampton raised one issue:

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 loss of use of the spine or a finding of permanent and total disability pursuant to § 42-9-30.

[R. P. 21].

This statement satisfies the requirements for an appeal as it puts all parties on notice of the issues to be determined.

Respondents add that "Frampton's new argument regarding Clemmons is not properly before the Court of Appeal in his Petition for Rehearing, which should be denied." [Return to Petition for Rehearing, page 39]. The original Clemmons opinion was issued on March 7, 2017. Oral argument before the Appellate Panel was held two weeks later on Marcy 21, 2017. Not only was Clemmons argued at length, Frampton's counsel even stated: "But I submit to you this is a classic Clemons case. And I'm kind of proud of myself because the Clemons case hasn't [sic] come out yet." [R.P. 136, lines 5-8].

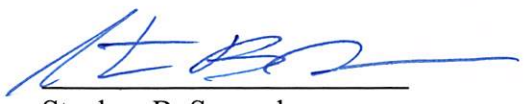
At trial, Frampton argued that "he has lost more than 50 percent of his back. Therefore he should be compensated under 42-9-30 on the basis of 500 weeks instead of 300 weeks . . ." [R. P. 69, line 24-page 70, line 1]. He further specifically relied on Dr. Bailey 78% cervical spine rating – which goes exactly to the holding in Clemmons. [R.P. 69, lines 12-17]. See Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017)(Commission must base partial disability awards to the back using regional impairment ratings from the 5th edition of the AMA Guides).

As to the merits, Clemmons requires that the Commission enter a disability award based on the regional impairment ratings rather than whole person ratings. To be faithful to Clemmons, the Commission must make an award no less than the 78% of the back. Id. Therefore, on remand the Commission should be directed to follow Clemmons.

## 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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July 9, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Appellate Case No.: 2017-001764

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Chisholm Frampton, . . . . . Appellant,

v.

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

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**PROOF OF SERVICE**

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I certify that I, Wanda Powell, paralegal to Stephen B. Samuels have caused the **Reply to Return to Petition for Rehearing** to be served upon the below parties on July 9, 2020, addressed as follows:

Kirsten L. Barr, Esquire
Trask & Howell, LLC
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***via email: kbarr@trask-howell.com***

Wanda Powell
Paralegal to Stephen B. Samuels

July 9, 2020
Columbia, South Carolina

SAMUELS REYNOLDS LAW FIRM

STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

July 9, 2020

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Jul 09 2020
SC Court of Appeals

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

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

Dear Ms. Kitchings:

Enclosed for filing, please find the Appellant's **Reply to Return to 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

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 **Reply to Return to 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

SBS/wp
Enclosure(s) as stated

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