THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5726 (S.C. Ct. App, Withdrawn, Substituted and Refiled November 18, 2020)
(Shearouse Adv. Sh. No. 45 at 8)

Chisolm Frampton, Employee, ... Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 18, 2020. [App. p. 180].

QUESTIONS PRESENTED

1. The majority erred in "finding the appellate panel did not err in reversing the single commissioner's conclusion that Frampton's claim was admitted."

2. The majority erred in misapplying and misinterpreting Section 42-9-35 to bar permanent partial disability compensation in an admitted case.

3. The majority erred in holding that the parties tried the issue of Section 42-9-35 by implied consent.

4. The majority erred in holding the appeal of the Single Commissioner's Section 42-9-30 award was not preserved; and in ruling her credibility finding on Dr. Bailey's Form 14B was based on evidence of Frampton's employment.

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

STATEMENT OF THE CASE

Chisolm Frampton is a long-time employee of the Department of Natural Resources ("DNR"). He injured his neck on September 4, 2010 while riding in a truck across a rough dove field in pursuit of people who appeared to leave the field hastily when they saw law enforcement. [App. p. 261, lines 9-23]. His Employer and their insurer, State Accident Fund ("Fund"), accepted his claim and sent him to Doctors Care. Frampton treated with Doctors Care on September 7th and 14th, 2010. He was diagnosed with "resolving cervical muscle strain" and released. [App. p. 342-345].

On September 21, 2010, the Fund filed a Form 19 denying the claim. [App. p. 176-177]. As instructed in the denial letter, Chisolm wrote a letter to Harry Gregory, the Director of the Fund, requesting that "you reconsider the decision by your agency to deny my workers compensation case,

file number 1012533, because I believe there was some misunderstanding of the work conditions that existed when I was injured while on duty on November 4, 2010 (sic)."[1] [App. p. 432-433].

In the meantime, Frampton consulted with a neurosurgeon, Dr. Byron Bailey, On March 15, 2011. Dr. Bailey noted "This is a gentleman who we are following for cervical radiculopathy." [App. p. 350]. Dr. Bailey had seen Frampton one time a year earlier (prior to the work accident). [App. p. 444]. After the physical exam and a repeat MRI showed progression of his symptoms from the previous year, Dr. Bailey performed a C5-6 cervical fusion on Frampton. [App. p. 350, 372, 382-383].

As the Fund had not yet reaccepted the case, Frampton used his health insurance to pay for the operation. The health insurance carrier paid $16,587.42 to Roper St. Francis Hospital on March 31, 2011. [App. p. 460].

Shortly thereafter on July 8, 2011, the Fund reversed their position and accepted the claim. The Fund paid $17,448.75 to Roper St. Francis on August 16, 2011. Upon receiving this payment, Roper St. Francis issued a refund to Frampton's health insurance on August 22, 2011. [App. p. 474].

Frampton was out of work from March 21, 2011 through May 1, 2011. He elected to use his sick leave. As part of accepting his claim, the Fund required Frampton to sign 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." [App. p. 480]. The Fund 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. [App. p. 479].

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[1]Frampton mistakenly wrote *November* when the accident actually occurred in *September*. The Commission found this was a scrivener's error on his part. [App. p. 191, Finding of Fact 2]. The letter itself is undated.

Thereafter the Fund continued to file a Form 18 (Periodic Report) every six months showing payment of compensation and medical treatment. [App. p. 481-489]. By the time of the hearing, the Fund had paid $25,413.07 for Frampton's medical treatment. [App. p. 489].

On September 20, 2013, Dr. Bailey completed a Form 14B (Physician's statement). He reported Frampton had sustained a 20% medical impairment to the cervical spine; was unable to return to work at this current employment;" and "will need future medical care and treatment *related to his or her work related injury . . .*" [App. p. 362(emphasis added)].

The Fund's claims adjuster, Lindsay Sadler, sent a questionnaire to Dr. Bailey asking him to "provide both a regional cervical rating and a whole person rating." Dr. Bailey responded on September 2, 2014. He modified his original 14B to comport with the 5th Edition of the AMA Guides. He corrected the whole person impairment rating to 26% and converted the whole person rating to a regional cervical rating of 78%. [App. p. 367-368].

Frampton filed a Form 50 (Employee's Request for Hearing) on November 17, 2014. [App. p. 215]. Frampton alleged injuries to his neck and right arm. He sought additional medical treatment and an award for permanent disability.

DNR and the Fund filed their Form 51 (Employer's Answer to Request for Hearing) on December 4, 2014. The Form 51 stated: "It is Admitted the employee sustained an injury or illness on or about the date set forth in the Form 50. . . . The Defendants admit an injury to the cervical spine only; however, extent of injury and all other body parts are denied. The Defendants deny an injury to the right arm." The 51 also "denied the employee is permanently disabled. The reasons for the denial are: Disability, if any, to be determined by the W.C.C." [App. p. 216].

The hearing was scheduled before Commissioner Aisha Taylor on July 15, 2015. Frampton

filed a Form 58 (Pre-hearing Brief) raising a single fact in controversy: "The degree of disability and loss of use of the neck (back) and both arms, and is the injured worker most probably permanently and totally disabled pursuant to law having lost more than 50% of his neck (back)." [App. p. 217].

Respondents filed their Form 58 (Pre-hearing Brief) on July 3, 2015 (12 days before the hearing). Respondents denied Frampton was "permanently and totally disabled because he is currently earning $102,590.00 annually as Deputy Director of the South Carolina Department of Natural Resources." They also contended he "aggravated his *work-related neck injury* in a motor vehicle accident that occurred while he was on vacation with his family in Palm Beach, Florida, and his vehicle was 'totaled." [App. p. 217-220 (emphasis added)]. Respondents did not raise a failure of proof of an aggravation of a preexisting condition nor did they plead § 42-9-35.

The case was tried on July 15, 2015. Frampton argued that based on the impairment ratings from Dr. Bailey (26% whole person/75% regional cervical spine) and Dr. Poletti[2] (33% whole person) he had lost more than 50% of his back such that he should be awarded a percentage of 500 weeks pursuant to S.C. Code 42-9-30(21)(2007). He also requested post-MMI medical treatment including a subsequent surgery recommended by both surgeons. [App. p. 253, line 8-p. 254, line 15].

Respondents argued the unpled issue (quoted by the Court of Appeals) that:

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

[App. p. 255, line 21-p. 256, line 15].

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[2]Dr. Steven Poletti conducted an IME on June 4, 2015. [App. p. 406-407].

Commissioner Taylor issued a Decision and Order on October 14, 2016 finding:

> 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. [App. p. 191, Finding of Fact 7].

She included a legal conclusion that "The Claimant did not meet his burden of proof under S.C. Code Ann. § 42-9-35." [App. p. 191, Finding of Fact 2]. She awarded 20% to the back based on Dr. Bailey's original 14B. She gave "Dr. Bailey's revised Form 14B very little weight due to his opinion that Claimant couldn't return to his current employment." [App. p. 193-194, Findings of Fact 14, 19].

Petitioner appealed contending the 20% award to the back was inconsistent with the evidence. [App. p. 225]. Respondents cross-appealed, contending it was error to award compensation after finding Frampton failed to meet his burden on proof under § 42-9-35. [App. p. 227]. In their Brief, Respondents stated "the Claimant *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." [App. p. 232 (emphasis added)].

Oral argument before the Appellate Panel was held on March 21, 2017. [R.P. 129-155].The Appellate Panel reversed on two grounds: (1) Frampton failed to prove an aggravation of a preexisting condition under § 42-9-35; and (2) that "[t]his finding . . . was not appealed and is affirmed the law of the case." [App. p. 212-213, Finding of Fact 6; Conclusion of Law 1]. The Appellate Panel omitted without explanation the Hearing Commissioner's finding that: "Nevertheless, Defendants admitted the claim and provided medical treatment." [App. p. 191, Finding of Fact 7].

Petitioner timely appealed to the Court of Appeals. In a 2-1 Decision, the court affirmed. Petitioner filed a (1) Petition for Rehearing, and (2) a Motion to Supplement Record on Appeal. [App. p. 80-109].

The court granted the motion to supplement the record. It also granted the Petition for Rehearing. The majority held "We find the appellate panel did not err in reversing the single commissioner's conclusion that Frampton's claim was admitted." The majority further held *sua sponte* that the Form 51 was to be construed as a general denial and that the unpled § 42-9-35 issue that "should have been raised in the Form 50, Form 51, or the Form 58 pre-hearing briefs . . . was litigated at the hearing by implied consent, and we find no error in the appellate panel's determination that Frampton's September 4, 2010 dove-field injury claim would only be compensable under the Worker's Compensation Act if Frampton satisfied his § 42-9-35 burden of proof." Lastly, the majority held that Frampton's appeal as to the sufficiency of the Single Commissioner's 20% award (reversed by the Appellate Panel) was unpreserved. Frampton v. S.C. Dept. of Natural Resources, Op. No. 5726 (S.C. Ct. App, Withdrawn, Substituted and Refiled November 18, 2020) (Shearouse Adv. Sh. No. 45 at 8).

In dissent, Chief Judge Lockemy wrote:

> Because this was an admitted case, I would hold the appellate panel erred by concluding that, pursuant to section 42-9-35, Frampton was required to prove that either the September 4, 2010 injury aggravated his preexisting condition or the preexisting condition aggravated the injury. Nothing in DNR's Form 51 or Form 58 notified Frampton that he would be required to show his September 4, 2010 accident aggravated a preexisting neck condition. I would therefore reverse the appellate panel's holding that Frampton was not entitled to any benefits under the Workers' Compensation Act.

Id., (Lockemy, C.J., dissenting).

Judge Lockemy further wrote:

> 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. Therefore, I believe the law of the case doctrine did not apply and the appellate panel erred by relying on this doctrine to support its holding.

Id., (Lockemy, C.J., dissenting)

This Petition followed.

ARGUMENT

This case presents the remarkable scenario where an injured worker undergoes neck surgery willingly paid for by his employer in an accepted workers' compensation case, yet is barred from receiving compensation for the resulting disability due to the untimely injection and incorrect interpretation of a statute enacted to *increase* rather than *limit* compensation. See S.C. Code Ann. § 42-9-170 (B)(2007)("the employee may receive further benefits as provided under the provisions of Section 42-9-35."). For a system designed "to avoid any incongruous or harsh results," this callous construction is strikingly out of place. Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). "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).

Beyond the interpretation of § 42-9-35, this case present important and novel issues concerning the meaning of an "accepted case"; the law of the case doctrine; trial of unpled issues by implied consent; misrepresentations of fact to the court; and the legality of a disability award inconsistent with this Court's decisions in Clemmons v. Lowe's Home Ctrs., Inc., 420 S.C. 282, 803

S.E.2d 268 (2017) and Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020).

As this case also includes a dissent in the Court of Appeals, it squarely meets the criteria under which the Court should exercise its sound discretion and issue the Writ of Certiorari to the Court of Appeals. Rule 242, SCACR.

1. The majority erred in "finding the appellate panel did not err in reversing the single commissioner's conclusion that Frampton's claim was admitted.

The Single Commissioner found Respondents "admitted the claim and provided medical treatment." [App. p. 191, Finding of Fact 7]. The majority opinion erred in finding "the appellate panel did not err in reversing the single commissioner's conclusion that Frampton's claim was admitted." Frampton v. S.C. Dept. of Natural Resources, Op. No. 5726 (S.C. Ct. App, Withdrawn, Substituted and Refiled November 18, 2020) (Shearouse Adv. Sh. No. 45 at 15. The majority misapprehends the legal significance of an employer accepting a claim in a workers' compensation case. Furthermore, the additional evidence shows the majority based its decision on a material misstatement of fact by Respondents regarding their payment for the surgery performed by Dr. Bailey.

The majority reasons "While DNR admitted an injury occurred on September 4, 2010, in its Form 51 and *provided initial treatment*, the inquiry into compensability under the Worker's Compensation Act does not end there. First, DNR's *initial provision of treatment* for Frampton's injury does not estop it from later contesting its compensability under the Act." Id. (emphasis added). Frampton is not arguing that the mere "initial provision of treatment" prevents an employer from later denying a claim. An employer could provide an emergency room visit or other limited initial treatment only to later deny the claim upon a good faith investigation. So long as the acceptance is revoked within the first 150 days, it is considered timely. In the instant case, DNR paid for neck

surgery and requested an impairment rating from a physician "authorized by the Employer/Carrier to treat this Claimant for his or her injury by accident" well after 150 days. [App. p. 367-368].

At the hearing and in their Brief, "Respondents consistently argued that the alleged events of September 4, 2010 caused nothing more than a cervical sprain or strain injury that quickly resolved." [App. p. 516]. This argument might have made sense *if* the case had been denied – more specifically, if it were denied that the work injury resulted in the need for surgery. The lynchpin is DNR's misleading allegation that "his cervical fusion surgery . . . was paid for under his Blue Cross Blue Shield Health benefits." [App. p. 255, line 25-p. 256, line 1].

During the rehearing period, Respondents introduced a medical bill showing a payment of $16,587.42 from BCBS on March 31, 2011 towards the hospital bill for Frampton's surgery. [App. p. 460]. They argue this evidence shows "any statement to the effect that his surgery was covered-by or paid-for by the BCBS State Health Plan is factually correct . . ." [App. p. 111]. And indeed, if it were a factually correct statement, Respondents would be right. Alas, they are not.

The medical bill submitted by Respondents is incomplete. The complete bill shows a *WORKERS COMP PAYMENT* of $17,448.79 on August 16, 2011, along with a refund to BCBS on August 22, 2011. [App. p. 474]. This shows BCBS initially paid the bill when the claim was closed. When the Fund reopened the claim on July 8, 2011, they paid the bill. St. Francis Hospital then issued the refund to BCBS. This is further confirmed by the Form 18's filed with the Commission. [App. p. 480-489].

The majority opinion presumes that only the *initial* two visits at Doctor's Care were paid by the Fund. The fact is the Fund paid for the cervical fusion performed by Dr. Bailey. Given that their pleadings admitted the injury, the sole fact in controversy at the hearing was the *degree* of loss of use

under § 42-9-30. Even now, Respondents admit Frampton's "claim met the requirements of S.C. Code Ann. § 42-1-160 . . ." [App. p. 523].

This is important because both the appellate panel and the majority misapprehend the *legal* meaning of an *accepted claim*.[3] When DNR belatedly accepted Frampton's claim and provided benefits, they necessarily accepted that any preexisting condition was aggravated and required surgery. Treatment and compensation (salary in lieu of compensation) were provided through May 17, 2011 – with payments for medical treatment continuing at least through November 17, 2014. [App. p. 480-489]. This date is well past the 150 day grace period where the employer can make a good faith denial of the claim.[4] 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."). The single commissioner was correct in awarding compensation because Respondents "admitted the claim and provided medical treatment." [App. p. 191, Finding of Fact 7].

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[3]At the Appellate Panel, Frampton argued: "This is an accepted case. How many times do you have to prove an accepted case?" [App. p. 330, lines 21-22].

[4]In Jervey the Court of Appeals reversed a legal ruling that "section 42–9–260 of the South Carolina Code is a [150 day] time bar for raising a defense against compensability." Jervey v. Martint Envtl., Inc., 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012). The court nonetheless affirmed on the other grounds of waiver and estoppel. This Court "vacate[d] that portion of the Court of Appeals' opinion addressing the import of section 42–9–260." Jervey v. Martint Envtl., Inc., 406 S.C. 210, 750 S.E.2d 90 (2013). The affect of this ruling is to restore the rule that section 42-9-260 (B)(3) is a 150-day time bar for raising a defense against compensability, after which the right to compensation is vested.

Note the one exception to this rule is subject matter jurisdiction – which is plainly not applicable here. See Frederick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009)(holding a challenge to subject matter jurisdiction arising out of fraud in the application can be raised at any time).

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

To receive an award, the claimant must prove a disability (from impairment) related to the work accident. 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. [App. p. 367-368]. 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 under the medical model set out in § 42-9-30.

The Court should grant the Writ and reverse the decision below. The Court should hold, as did the dissent, that "[b]ecause this was an admitted case, . . . the appellate panel erred by concluding that, pursuant to section 42-9-35, Frampton was required to prove that either the September 4, 2010 injury aggravated his preexisting condition or the preexisting condition aggravated the injury." Frampton at 20-21 (Lockemy, C.J. dissenting).

2. Section 42-9-35 does not create an entirely separate "heightened burden of proof" as it was enacted to clarify the combined effects rule and allow additional compensation.

The majority opinion of the Court of Appeals held:

> [We] agree with the appellate panel that when the facts of a worker's compensation case give rise to a claim that falls under § 42-9-35, it is the burden of the claimant to prove 'by a preponderance of the evidence, including medical evidence, that . . . the subsequent injury aggravated the preexisting condition or permanent physical impairment; or . . . the preexisting condition or the permanent physical impairment

> aggravates the subsequent injury' *in order to be eligible for compensation for that injury*. Frampton at 16 (emphasis added), *quoting* S.C. Code Ann. § 42-9-35 (2007)

Nowhere in the statute does it state that proof of an aggravation of a preexisting condition is a separate and distinct prerequisite "to be eligible" for an award for permanent partial disability. When read together with sections 42-9-150 and 170, the primary purpose of the statute is to allow an employee with a preexisting impairment or disability to "receive *further benefits* as provided under the provisions of Section 42-9-35." S.C. Code Ann. §§ 42-9-150; 42-90-170 (B) (2007). The additional language was simply added by the majority.

The statute was enacted to preserve the ability of an employee with a preexisting condition to receive full compensation for the disability without apportionment between disability resulting from a preexisting condition and a work injury. The Legislature eliminated the Second Injury Fund, yet preserved full compensation for employees with preexisting conditions who previously qualified for additional compensation.

This Court has never had occasion to interpret § 42-9-35.[5] The majority decision of the Court of Appeals creates an ambiguity. "The cardinal rule of statutory interpretation is to ascertain and

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[5]Several opinions from the Court of Appeals reference § 42-9-35 in dicta. See, eg. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2013)(stating § 42-9-35 applies to "[a]n injured employee 'who has a permanent physical impairment or preexisting condition' may receive benefits for a subsequent work-related disability if he establishes by a preponderance of the evidence that 'the subsequent injury aggravated the preexisting condition or permanent physical impairment.'"); Murphy v. Corning, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011)("although the Commission did not refer to section 42–9–35 in its order, it made the necessary findings under the statute."). But see, Lemon v. Mt. Pleasant Waterworks, 429 S.C. 59, 837 S.E.2d 738 (Ct. App. 2019),*cert. granted* (noting the 2007 amendment which eliminated the Second Injury Fund also added replacement language in § 42-9-170 (B) stating "the employee may receive further benefits as provided under the provisions of section 42-9-35. . . .").

effectuate the intention of the legislature." Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "[T[he statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189 (2014). See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result.").

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

The answer to those questions is complicated, yet entirely logical. Section 42-9-35 arose from the Legislature's desire to (1) eliminate the Second Injury Fund;[6] and (2) legislatively reverse the "combined effects" rule established in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006)("combined effects" of an unrelated preexisting condition and compensable injury allow award for general disability even though there is no aggravation among them). The reaction to Ellison was swift. The Legislature amended §§ 42-9-150 and 42-9-170, and enacted a new statute (§ 42-9-

[6]The purpose of the Second Injury Fund was to "encourage the employment of disabled or handicapped persons without penalizing an employer with greater liability if the employee is injured because of his preexisting condition." Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995)

35) to eliminate the "combined effects" exception to Singleton v. Young Lumber Company, 236 S.C. 454, 114 S.E.2d 837 (1960)(additional body part must be injured or affected to qualify for general disability). It also amended § 42-9-400 to prospectively eliminate the Second Injury Fund.

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

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

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

Section 42-9-35 legislatively overruled the "combined effects" doctrine by requiring the employee to prove that: "(1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury." S.C. Code Ann. § 42-9-35 (A)(2007). The statute preserved the Commission's authority to

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

S.C. Code Ann. § 42-9-35 (B)(2007).

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

To bring the issue into focus, section 42-9-35 was not enacted to create an additional burden on injured workers with preexisting conditions. It would be absurd to deny compensation when other

workers with the same admitted injury and impairment are compensated for the resulting disability. "The statutory language must be construed in light of the intended purpose of the statute. This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless . . ." Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189 (2014)(internal citations omitted).

The Court should issue the Writ of Certiorari to review and reverse the erroneous application of § 42-9-35 by the Appellate Panel and the Court of Appeals.

3. The majority erred in holding the unpled defense of section 42-9-35 was tried by implied consent.

The majority held:

> we find the issue of whether Frampton's dove-field injury was compensable under § 42-9-35 was *litigated at the hearing by implied consent*, and we find no error in the appellate panel's determination that Frampton's September 4, 2010 dove-field injury claim would only be compensable under the Worker's Compensation Act if Frampton satisfied his § 42-9-35 burden of proof.

Frampton v. S.C. Dept. of Natural Resources, Op. No. 5726 (S.C. Ct. App, Withdrawn, Substituted and Refiled November 18, 2020) (Shearouse Adv. Sh. No. 45 at 17.

It should concern the Court that this dispositive issue was not raised by the Appellate Panel nor by the majority in its initial decision. It appears for the first time in a single sentence (with an accompanying footnote) in Respondent's Return to the Petition for Rehearing, ultimately becoming a dispositive issue in the refiled majority opinion. [App. p. 75, 75 n.25].

The majority observed "although it should have been raised in the Form 50, Form 51, or the Form 58 pre-hearing briefs, the issue of Frampton's preexisting diagnosis and its effect on the compensability of his September 4, 2010 dove-field injury was not raised until the contested-case hearing itself." Id. at 17. Cf. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered

or stricken by amendment or otherwise."). The majority correctly states:

> the procedures in the Act and its accompanying regulations are designed so that once the Forms are completed and filed, only very narrow contested issues will proceed to a hearing—with abundant notice—so the single commissioner is able to make an expedient and fair compensation decision for both the employer and employee.

This concept was applied in Morgan v. JPS Automotives, 321 S.C. 201, 203, 467 S.E.2d 457, 459 (Ct. App. 1996) (finding that when claimant entered the contested-case hearing understanding the sole issue to be eligibility for temporary benefits, but the issue of disability compensation was raised, claimant's oral motion for an adjournment to retrieve additional proof of disability should have been granted). Morgan suggests, as does the majority's discussion, that amendment by implied consent is at a minimum disfavored in workers' compensation if not outright prohibited.[7]

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.

> The decision to permit an amendment is within the trial court's discretion. Nevertheless, *[an appellate court] will not find implied consent to try an issue if all of the parties did not recognize it as an issue during trial, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment.* This is so because the opposing party may not be conscious of the relevance of the evidence to issues not raised by the pleadings if the relevance is not otherwise made clear.

Dunbar v. Carlson, 533 S.E.2d 913, 341 S.C. 261 (Ct. App. 2000)(emphasis added by court), *quoting* Williams v. Addison, 314 S.C. 35, 443 S.E.2d 582 (Ct. App.1994).

The first issue then is whether *all* parties recognized section 42-9-35 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.

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[7]Morgan differs from the instant case in that Morgan recognized the issue of permanent disability compensation would ultimately have to be adjudicated. As such, she had started the process of obtaining vocational evidence to prove general disability. The real issue in the case was whether her motion to adjourn to present this evidence should have been granted under the Commission's regulations.

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. These records and the questions propounded to him during cross-examination were equally relevant to issues already in the case, including the degree to which Frampton's work accident contributed to his resulting disability. Respondents even admit that the purpose for which they were actually used at trial was to impeach Frampton's credibility "with his own medical records." [App. p. 58 n.11]. Given that the case was accepted and that § 42-9-35 was never raised in the pleadings (nor at trial), Frampton did not recognize that Respondents were using this seemingly inconsequential evidence to support a complete change in their position, let alone a novel legal theory relying on a strained interpretation of a statute they did not mention one time at trial.

This type of tactical ambush was rejected in Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). In Dunbar, the defense attorney questioned a witness at length about her mother's medical care and condition without objection. Defendants then moved to amend their pleadings to assert the statute of limitations. The trial judge granted the motion and directed a verdict for the defense.

The Court of Appeals reversed, reasoning:

> [Defendant] asserts [Plaintiff] impliedly consented to the amendment based on her failure to object to her daughter's testimony. To the contrary, we find the failure to

> object in this case is evidence that [Plaintiff] did not recognize the purpose for which [Defendant] sought to elicit this testimony. [Defendant] further argues [Plaintiff] cannot claim the amendment prejudiced her since she did not object to the testimony. We disagree. The prejudice to [Plaintiff] is patent in that the trial judge granted a directed verdict against [Plaintiff] immediately after permitting [Defendant's] amendment. Unaware this was an issue in the case, [Plaintiff] had not offered any evidence regarding the statute of limitations.

Id. at 267, 533 S.E.2d 913 (internal citation omitted).

As in Dunbar, allowing DNR to proceed on an unpled issue without notice to Framptoon 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). This was not a tactical move on his part as the majority suggests; it confirms that he "did not recognize the purpose for which [DNR] sought to elicit this testimony."

The situation is even more egregious because Frampton prevailed at trial. A motion to amend the pleadings was never made at trial – nor was it argued by Respondents that Frampton implicitly consented to amend the pleadings. Nor was section 42-9-35 mentioned at trial. Section 42-9-35 did not appear until written into the single commissioner's order, and even then, she ruled it did not apply.

The Court should issue the Writ and reverse the Court of Appeals. If a ruling were to be made on amendment by implied consent, it should have been made by the single commissioner. Frampton

did not impliedly consent to an amendment to the pleading because the evidence presented was relevant on other issues. He suffered manifest prejudice as the issue on § 42-9-35 was the primary reason the appellate panel denied his claim for permanent partial disability compensation and post-MMI medical treatment.

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

The Single Commissioner awarded 20% permanent partial disability to Frampton's back under Section 42-9-30(21). The Court of Appeals affirmed the correctness of this award, albeit in dicta, holding (1) the issue was unpreserved and (2) "it is clear from the single commissioner's order that she only considered Frampton's return to work, subsequent promotions, and earning capacity in the context of determining the lack of credibility of Dr. Bailey's revised Form 14B and in determining Claimant was not entitled to benefits under S.C. Code Ann. § 42-9-10 (2015), which is not at issue." Frampton v. S.C. Dept. of Natural Resources, Op. No. 5726 (S.C. Ct. App, Withdrawn, Substituted and Refiled November 18, 2020) (Shearouse Adv. Sh. No. 45 at 19).

The issue of the legal inadequacy of the award is preserved as it was raised in the Form 30 and Appellant's brief to the Full Commission. The brief argues "This claim was awarded pursuant to § 42-9-30, SC Code of Laws, 1976, which does not require a showing of loss of income capacity." Petitioner argued that the Single Commissioner analyzed the case as if it were a general disability case because she based the paucity of the award on Frampton's post-injury earnings and promotions. [App. p. 228-230]. There is no reference to section 42-9-10 in the single commissioner's order.

As to the award itself, the Court of Appeals misapprehended the single commissioner's credibility finding on Dr. Bailey's revised 14B. This Court recently addressed "the important role

credibility findings play when credibility reasonably and meaningfully relates to factual disputes to be decided by the commission." Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020)). The Court explained "where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact." Id. The Court went on to reverse the commission's disregard of medical evidence on credibility grounds because the "permanent impairment caused [by the injury was] based on objective medical evidence." Id.

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

Dr. Bailey's original 14B assigned an impairment rating of 20% to the cervical spine. [App. p. 362]. He modified the original 14B to comport with the 5th Edition of the AMA Guide. The corrected impairment rating was 26% of the whole person converted to 78% regional cervical spine rating. At the request of the Fund, he confirmed his intent to change the original impairment rating and added the hand written notation referencing page 392 of the AMA Guides. [App. p. 367-368]. As it is directly out of the AMA Guides, this is objective medical evidence of his impairment rating.

"[T[he commission must explain how the credibility determination is important to making the particular factual finding." Crane. The Single Commissioner found:

> Based on Claimant's return to work and promotions received since his original date of injury, I give Dr. Bailey's revised Form 14B very little weight due to his opinion that Claimant couldn't return to his current employment. That opinion is completely

disproven by the facts of the case and calls into question *the additional information placed in the revised Form 14B."*

[App. p. 193, Finding of Fact 14(emphasis added)].

The fundamental problem with this finding is that the statement about being unable to return to his current employment is the same in both the original and revised 14B. It is therefore arbitrary and capricious for the Single Commissioner to give reduced weight to the 14B correcting the impairment rating when her reason is entirely unrelated to the correction. Furthermore, the medical evidence of significant impairment from Drs. Bailey and Poletti is uncontradicted.

This case should be remanded to the Appellate Panel to determine Frampton's permanent partial disability under section 42-9-30(21) based on the framework set forth in Clemmons. The Commission should be directed to apply Dr. Bailey's 78% regional cervical spine rating and Dr. Poletti's 94% regional cervical spine rating (converted from 33% whole person rating).

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

Petitioner respectfully requests the Court to adopt the dissenting opinion of Chief Judge Lockemy wherein he concludes "the appellate panel misapplied 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."[8] Frampton at 21.

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[8]In the refiled opinion, the majority did not reach a decision on the issue because it found substantial evidence supported the Appellate Panel's finding that Frampton failed to meet his burden of proof under section 42-9-35. This was an error of law, as there was no such burden in an accepted case, particularly where the emnployer admits he met the aggravation requirement of § 42-1-160. If Frampton is required to produce additional proof, then he should be allowed to produce such proof on remand as it was error to find § 42-9-35 was tried by implied consent. To the extent Frampton was required to prove disability under section 42-9-30, he did so with the opinions of Dr. Bailey and Poletti, along with his testimony as to his physical condition.

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

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

This goes against established law where respondents are treated differently than appellants when it comes to issue preservation. "Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . In contrast, different preservation rules apply to an appellant—the losing party in the lower court." I'ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

In the instant case, Petitioner did raise an additional ground to the Court of Appeals, to wit, the fact that the single commissioner ruled section 42-9-35 did not apply because the Respondents "admitted the claim and provided medical treatment." [App. p. 191, Finding of Fact 7]. The Appellate Panel reversed this finding *making new findings of fact and wholly new conclusions of law applying section 42-9-35 to bar the entire claim.*[9] [App. p. 213-214, Conclusion of Law 1-2]. Once

[9] These new findings were made by the Appellate Panel itself. As such, they are new findings and conclusions, which by definition cannot be the law of the case. Although the Appellate Panel technically sits in an appellate capacity, it makes its

the Appellate Panel made a new ruling on the applicability of section 42-9-35, the issue morphed from incidental inconsequential dicta to the dispositive ruling in the case. To hold that this new ruling cannot be challenged on appeal is neither proper nor fair.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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December 18, 2020
Columbia, South Carolina

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own findings of fact and conclusions of law. See Muir v. CR Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999)("Although it is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law."). The Appellate Panel did not simply adopt the single commissioner's findings – as is common when the Appellate Panel affirms. It made its own rulings which necessarily can addressed by this Court on appeal.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Op. No. 5726 (S.C. Ct App, Withdrawn Substituted and Refiled November 18, 2020)
(Shearouse Adv. Sh. No. 45 and 8)

Chisholm Frampton, ... Petitioner,

v.

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

PROOF OF SERVICE

I certify that I, Wanda Powell, paralegal to Stephen B. Samuels have caused the **Petition for a Writ of Certiorari** and **Appendix** to be served by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the December 18, 2020, addressed as follows:

Kirsten L. Barr, Esquire
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P.O. Box 2167
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via email: kbarr@trask-howell.com
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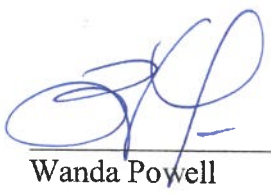
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201
Via email: (ctappfilings@sccourts.org)



Wanda Powell
Paralegal to Stephen B. Samuels

December 18, 2020

SAMUELS REYNOLDS
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STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

December 18, 2020

VIA DROP BOX
Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

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

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of our **Petition for a Writ of Certiorari** in the above-referenced matter along with our check in the amount of Two Hundred Fifty Dollars ($250.00) Dollars as payment of the filing fee. We have also enclosed two (2) copies of the **Appendix**, one of which is unbound per Rule 267(d).

By copy of this letter and enclosure to Kirsten L. Barr, counsel of record for the Respondents, we are serving a copy of our **Petition for a Writ of Certiorari** and **Appendix** upon her as indicated by the attached Proof of Service. We are also providing a copy of our **Petition for a Writ of Certiorari** to the South Carolina Court of Appeals pursuant to Rule 242(c).

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration. With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/wp
Enclosure(s) as stated

cc: Kirsten L. Barr, Esquire
John C. Land, III, Esquire
The Honorable Jenny Abbott Kitchings, Clerk of the SC Court of Appeals