

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

W.C.C. 1012533
Appellate Case No. 2020-001644

Opinion No. 5726
Heard September 19, 2019 – Filed May 13, 2020
Withdrawn, Substituted and Refiled November 18, 2020

Chisolm Frampton, Employee.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

- I. Did the Court of Appeals properly conclude the Respondents did not admit liability for permanent disability benefits?
- II. Are Frampton's new arguments regarding the application of S.C. Code Ann. § 42-9-260 not preserved for appeal and otherwise without merit?
- III. Is S.C. Code Ann. § 42-9-35 a mandatory pre-requisite to an award of workers' compensation benefits where there is a pre-existing condition?
- IV. Is the Commission's finding that the September 4, 2010 accident did not aggravate Frampton's pre-existing neck problem supported by substantial evidence?
- V. Did the Court of Appeals properly conclude that Frampton failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 based on substantial evidence?
- VI. Does S.C. Code Ann. § 42-9-35 properly apply to the undisputed facts of this claim?
- VII. Because the Workers' Compensation Commission vacated the Hearing Commissioner's award under S.C. Code Ann. § 42-9-30, are arguments regarding calculation of that award moot?

Counter-Statement of the Case

The Petitioner ("Frampton") alleges that on September 4, 2010, he was working a dove field "when pain suddenly occurred in his neck." (A. p.215). He was seen at Doctor's Care three days later and diagnosed with a "cervical strain." (A. p.342). Frampton was seen at Doctor's Care again on September 17, 2010, at which time his diagnosis was "resolving cervical muscle strain" and he was released to "full duty" without any restrictions or recommendation for any additional medical treatment. (A. pp.344—345). On September 23, 2010, the Respondents filed

a Form 19 with the Workers' Compensation Commission formally denying the claim and, as a result, the Commission closed Frampton's claim on September 28, 2010.¹ (A. p.136).

After more than four years of working his regular, full-duty job, Frampton filed a Form 50 claiming additional benefits under the Workers' Compensation Act on November 18, 2014. (A. p.215). By Form 51 dated December 4, 2014, the Respondents admitted the alleged dove field incident, but specifically denied the "extent of injury" and further denied that Frampton was entitled to any medical or compensation benefits as a result. (A. p.216). Contrary to the Frampton's allegations, the Respondents did not, at any time, admit "liability" for workers' compensation benefits.

Instead, the Respondents consistently argued that the September 4, 2010 dove field incident caused nothing more than a "strain" injury that quickly resolved. (A. pp.221--224; p.254, line 20--p.255, line 3; pp.342--345). The Respondents further argued that Frampton did not aggravate any of his known pre-existing conditions, which include a C6-7 radiculopathy diagnosed approximately six months earlier. (A. p.255, lines 4--15). In addition, the Respondents argued that Frampton reinjured his neck in a subsequent intervening accident on November 4, 2010, after which he required a cervical fusion surgery that was initially covered under the BCBS State Health Plan at his request. (A. p.255, line 20--p.256, line 4; pp.117--128). Frampton later reinjured his neck in yet another subsequent, intervening motor vehicle accident on May 16, 2011. (A. p.216 #6, p.256, lines 4--21).² Therefore, the Respondents consistently

¹ Frampton's claim was not re-opened until July 8, 2011, which is after he alleged a new injury to his neck as a result of a motor vehicle accident in Florida while operating a state vehicle and after he wrote to the former Director of the State Accident Fund alleging an injury to his neck on November 4, 2010. (A. p.353, pp.248--249). During the period between September 28, 2010 and July 8, 2011, the Respondents did not pay any workers' compensation benefits to Frampton or on his behalf.

² A fourth neck injury claim was filed on February 3, 2021 (W.C.C. File No. 2014574).

argued that any permanent disability or need for medical treatment was not causally-related to the dove field incident of September 4, 2010 and not the responsibility of the Respondents.

An evidentiary hearing was held by Commissioner Taylor on July 15, 2017, pursuant to the Forms 50 and 51. (A. p.250). In her October 3, 2016 Decision and Order, Commissioner Taylor awarded Frampton benefits for a 20% loss of use of the back, despite finding that he “suffered from pre-existing neck pain and right arm numbness” and finding that

“there is no medical evidence stated to a reasonable degree of medical certainty that [Frampton’s] September 4, 2010 dove field incident aggravated or exacerbated his pre-existing neck condition for which he was already treating with a neurosurgeon.” (A. p.191 #7).

Commissioner Taylor also concluded that Frampton “did not meet his burden of proof under S.C. Code Ann. § 42-9-35.” (A. p.195 #2). Neither these factual findings, nor this seminal legal conclusion, were appealed by Frampton to the Commission’s Appellate Panel. (A. p.225).

In fact, the sole issue raised by Frampton’s October 17, 2016 Form 30, Request for Commission Review, was with regard to “the finding that the injured worker only lost 20% of the spine... pursuant to §42-9-30.” (A. p.225). Neither Frampton’s Form 30, nor his brief to the Commission’s Appellate Panel, make any reference to any evidence that could support a claim of causation, or to his statutory burden of proof under S.C. Code Ann. § 42-9-35, or to Commissioner Taylor’s finding and conclusion that he had failed to meet that statutory burden. (A. p.225, lines 44—47).

The Respondents filed a cross-appeal by Form 30 dated October 17, 2016, arguing, *inter alia*, that Commissioner Taylor erred “as a matter of law in awarding medical and compensation benefits to the Claimant after finding and concluding that the Claimant did not meet his burden

of proof under S.C. Code Ann. § 42-9-35.” (A. p.227 #1). The entirety of Frampton’s response to this argument, contained in his Brief to the Appellate Panel (A. p.245 “I”), was:

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

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

As a result, the Commission’s Appellate Panel issued its final Decision and Order dated July 24, 2017, concluding that because Frampton “failed to satisfy his burden of proof under S.C. Code Ann. § 42-9-35, he is not entitled to any benefits under the Workers’ Compensation Act as a matter of law.” (A. pp.213—214). The Appellate Panel reversed and vacated the Hearing Commissioner’s award of benefits under S.C. Code Ann. § 42-9-30. (A. p. 211, lines 8—9).

In his appeal to the Court of Appeals, Frampton made no attempt to dispute the fact that his neck problems and need for medical treatment pre-existed the events of September 4, 2010, or the fact that there is no medical evidence that the work accident aggravated his pre-existing condition, or that his own testimony on the subject was found to lack credibility. Indeed, Frampton did not appeal the Appellate Panel’s finding that his own

“physician, Dr. Bailey, never addressed the issue of whether the alleged accident on September 4, 2010 aggravated the pre-existing neck and right arm conditions...and there are no other documents, records or other material that address this issue...” (A. p.213 #7).

On appeal, Frampton instead argued that he did not need to prove that the condition for which he sought benefits was causally-related to the events of September 4, 2010 under S.C. Code Ann. § 42-9-35 or § 42-1-160.

The Court of Appeals filed its Opinion on May 13, 2020 rejecting this argument and concluding that “substantial evidence supporting the appellate panel’s conclusion.” (A. p.12). The Court of Appeals also rejected Frampton’s argument regarding Commissioner Taylor’s consideration of “his post-injury return to work and subsequent promotions” in weighing certain evidence in support of an award that was ultimately vacated by the Appellate Panel. (A p.12).

Arguments

I. The Respondents did not admit liability for permanent disability benefits.

Frampton inexplicably argues that he is entitled to a disability award under S.C. Code Ann. § 42-9-30 based on his claim that “liability was admitted” by the Respondents and that this “fact” is the law of the case.³ This argument is wholly without merit. Indeed, the Court of Appeals correctly noted that although the Respondents admitted the dove field incident on its Form 51, his entitlement to benefits was consistently denied. (A. pp.8—9). Moreover, it appears that Frampton misapprehends the Workers’ Compensation Act’s multiple statutory requirements, as his Petition for Writ of Certiorari boldly suggests that, without further proof, “[i]f the claim is accepted...medical treatment is provided, and temporary disability compensation is paid...[and] compensation is provided as either permanent total or partial disability....”

³ Frampton misstates Commissioner Taylor’s finding, suggesting that she found that “liability was admitted.” This is incorrect. Commissioner Taylor noted only that the Respondents “admitted the claim,” *i.e.*, admitted that the claim met the requirements of S.C. Code Ann. § 42-1-160. (A. p.191 #7).

What this facile argument fails to consider is that even when an employee meets his burden of proving an injury by accident arising out of and in the course of his employment pursuant to S.C. Code Ann. § 42-1-160, he is not automatically entitled to any benefits. Instead, to collect temporary disability compensation, an employee must actually prove his entitlement to these benefits under S.C. Code Ann. §§ 42-9-10, 42-9-20, and/or 42-9-260 with evidence of a causally-related temporary loss of wage-earning capacity. *See Lee v. Bondex, Inc.*, 405 S.C. 97, 102, 749 S.E.2d 155, 157 (Ct. App. 2013; *see also Crisp v. South Co.*, 401 S.C. 627, 645, 738 S.E.2d 835, 844 (2013). If an employee desires medical benefits, he must actually prove his entitlement under S.C. Code Ann. § 42-15-60 with “evidence stated to a reasonable degree of medical certainty” that he requires such treatment to “lessen the period of disability” caused by the work-accident. *See Crisp v. South Co.*, *supra*; *see also Clade v. Champion Labs*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Thereafter, if the employee expects payment of permanent disability benefits, he must actually prove that he has a permanent loss of wage-earning capacity (or permanent loss of use of a scheduled body member) as a result of the work accident under S.C. Code Ann. §§ 42-9-10, 42-9-20, or 42-9-30. *See Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 105, n.3, 580 S.E.2d 100, 102, n.3 (2003) (internal citations omitted); *see also Coleman v. Quality Concrete*, 245 S.C. 625, 142 S.E.2d 43 (1965). If the employee has a pre-existing condition, the plain language of S.C. Code Ann. § 42-9-35 places a heightened, mandatory burden of proof upon him to actually prove, with expert medical evidence, that the accident for which he seeks benefits actually aggravated the pre-existing condition. No workers’ compensation benefits flow automatically from S.C. Code Ann. § 42-1-160 in any case, but instead such benefits are governed by multiple statutes with varying burdens of proof, all of

which are borne by the employee. While the employer may admit liability for disability benefits without a hearing, plainly that was not true in the case *sub judice*.

Three days after the alleged events of September 4, 2010, Frampton was seen at Doctor's Care and diagnosed with a "cervical strain." (A. p.342). By September 17, 2010, Frampton's "cervical muscle strain" was considered "resolving" and he was released to "full duty" without any work restrictions and without any recommendation for additional medical treatment. (A. pp.344—245).⁴ Thereafter, on September 23, 2010, the Respondents formally denied the claim and filed a Form 19 with the Workers' Compensation Commission, which closed Frampton's claim on September 28, 2010.⁵ (A. p.136).

On November 18, 2014, when Frampton first filed a Form 50 claiming additional benefits under the Workers' Compensation Act, he characterized his accident as: "bouncing along in a pick-up truck in a rough dove field when pain suddenly occurred in his neck and right arm." (A. p.215). By Form 51 dated December 4, 2014, the Respondents did not deny that Frampton may have felt "pain" in his neck on September 4, 2010, but the Respondents specifically "denied" the "extent of injury" and further "denied" that Frampton was entitled to any medical or compensation benefits as a result. (A. p.216).

⁴ Frampton did not seek additional medical treatment until six months later when he reported to Dr. Bailey that he had a "14 month" history of neck pain that occurred "gradually." (A. pp.449—452; p.350). Dr. Bailey performed surgery a week later on March 21, 2011 and records reflect his "Financial Class" was his health insurance, "Blue Cross." (A. p.385). Frampton did not have an active workers' compensation claim in March 2011 and the Respondents did not authorize the surgery or treatment with Dr. Bailey. (A. pp.135—136). Even Frampton previously admitted that "...nobody contests – that the neurosurgeon's notes...list Frampton's health insurance, not workers' compensation. (A. pp.350-352; pp.380—381; p.385; p.387)." (A. pp.495—496).

⁵ Frampton's claim was not re-opened until July 8, 2011, which is after he alleged a new injury to his neck as a result of a motor vehicle accident in Florida while operating a state vehicle and after he wrote to the former Director of the State Accident Fund alleging an injury to his neck on November 4, 2010. (A. p.353, pp.432—433).

Contrary to the Frampton's allegations, the Respondents did not, at any time, admit "liability" for workers' compensation benefits. This fact is made clear on the Respondent's Form 51, which plainly states, "It is Denied the employee Needs/Is Entitled to Additional medical care as a result of injury or illness" and "It is Denied the employee is entitled to temporary total disability," and "It is Denied the employee is permanently disabled" [sic]. (A. p.216). Nothing about the Respondent's Form 51 admits that the events in a dove field on September 4, 2010 aggravated Frampton's pre-existing neck condition or admits "liability" for any benefits under the Workers' Compensation Act.

Similarly, on their Form 58 (Pre-Hearing Brief), the Respondents described their only admission as follows: "Claimant was walking in a dove field and later complained of neck pain." (A. p.221). Not only does the Respondents' Form 58 not admit any injury aside from "neck pain," but the Respondents' Form 58 also specifically denies Frampton was entitled to any compensation for permanent disability under S.C. Code Ann. § 42-9-30. (A. p.222). The Respondent's Form 58 clearly states that Frampton "suffered a non-disabling neck injury as a result of the September 4, 2010 work accident" and questions the degree of any disability "causally-related to the September 4, 2010 accident, for which he was originally released to full duty without restrictions and for which no additional medical treatment was recommended." (A. pp.222--223, pp.342—345). Like the other pleadings, the Respondents' Form 58 did not admit the existence of any causally-related disability or that Frampton was entitled to any benefits under the Act. (A. p.216; pp.221—223; p.254, line 20—p.258, line 2).

Simply because the Respondents admitted the existence of neck pain following the dove field incident under S.C. Code Ann. § 42-1-160, Frampton was not absolved of his burden of proving his entitlement to benefits under the Workers' Compensation Act. Instead, even where

an accident is admitted, the burden is upon the employee to prove by a preponderance of evidence that he is entitled to the benefits he claims under S.C. Code Ann. § 42-9-30.⁶ *See Fields v. Owens Corning Fiberglass*, 301 S.C. 554, 393 S.E.2d 172 (1990) (holding that an “award under the scheduled loss statute...is premised upon the threshold requirement that the claimant prove a loss, or loss of use of, a specific ‘member, organ, or part of the body.’”). Where, as is here, there is a pre-existing condition, the employee faces an additional burden of proof under S.C. Code Ann. § 42-9-35 before he can be entitled to any compensation benefits.

Nothing about the Respondents’ conduct in this claim excused Frampton’s burden of proving causation under S.C. Code Ann. § 42-9-30 or § 42-9-35. Indeed, everything about the Respondents’ pleadings put Frampton on notice that the Respondents denied he was entitled to any additional benefits under the Workers’ Compensation Act based on a lack of causation. Therefore, not only was Frampton required to prove he has a permanent loss of use of his back, but he was also required to prove that alleged loss was causally-related to the dove field incident on September 4, 2010, as opposed to his pre-existing condition or a subsequent intervening accident. Despite Frampton’s statutory burden of proof and despite the Respondent’s denials that this burden had been met, Frampton failed to prove, with any competent evidence, that his alleged disability was casually-related to the events in the dove field on September 4, 2010. *See Bundrick v. Powell’s Garage*, 248 S.C. 496, 151 S.E.2d 437 (1966) (holding that an award of benefits under S.C. Code Ann. § 42-9-30 must be founded on evidence of sufficient substance and not mere surmise, conjecture, or speculation). As such, Frampton’s arguments regarding the

⁶ Note that the Petitioner has abandoned his claims to benefits under any other provision of the Workers’ Compensation Act, including any claim for medical benefits. (A. p.225; pp.228-231, pp.244—246; p.495; pp.15—39).

Respondents' admissions are neither factually accurate, nor legally relevant, and were properly rejected by the Court of Appeals.

II. Frampton's new arguments regarding the application of S.C. Code Ann. § 42-9-260 are not preserved for appeal and are otherwise without merit.

Frampton argued for the first time in his Petition for Rehearing "that section 42-9-260 is a 150-day time bar for raising a defense against compensability." (A. p.24, fn.6) and raises it again in his Petition for Writ of Certiorari. There is no reference to, or even mention of, S.C. Code Ann. § 42-9-260 in Frampton's appeal to the Appellate Panel, or in his Briefs to the Court of Appeals. (A. p.227; pp.228—231; pp.244—246; p.494; p.533). Frampton neither raised below, nor preserved for appeal, any argument that S.C. Code Ann. § 42-9-260 somehow eliminates his burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35. Therefore, this novel argument is not properly before the Supreme Court. *See Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997) (holding that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal).

In addition, Frampton's new argument regarding S.C. Code Ann. § 42-9-260 is wholly without merit. S.C. Code Ann. § 42-9-260 says absolutely nothing about an employee's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35 being eliminated if he receives benefits for more than 150 days. Furthermore, as the Court of Appeals correctly noted, not even the provision of medical treatment for nearly five times as long (728 days) constitutes a waiver of the right to contest compensability of an employee's injury, citing *Dozier v. Am. Red Cross*, 411 S.C. 274, 292-293, 768 S.E.2d 222, 231-232 (Ct. App. 2014).

Not only does S.C. Code Ann. § 42-9-260 not speak to the payment of medical bills whatsoever, it certainly does not purport to eliminate an employee's burden of proof under S.C.

Code Ann. § 42-9-30 or § 42-9-35 based on the amount or duration of payments.⁷ As the Court of Appeals correctly explained, if the provision of medical benefits were deemed an admission of liability, it

“would discourage employers from providing any level of treatment for a certain condition for fear that providing treatment for a potentially unrelated condition would irrevocably affect a future finding on permanent disability.” Dozier v. Am. Red Cross, 411 S.C. 274, 292–93, 768 S.E.2d 222, 231–32 (Ct. App. 2014).

Therefore, the Court of Appeals properly applied case law firmly establishing an employer’s right to contest the issue of permanent disability, even when benefits have been provided, in concluding Frampton is not entitled to any workers’ compensation benefits as a matter of law.

III. S.C. Code Ann. § 42-9-35 is a mandatory pre-requisite to an award of workers’ compensation benefits where there is a pre-existing condition, not an affirmative defense.

⁷ The Record contains no evidence regarding the payment of specific medical bills or their amounts. While Frampton’s Supplemental the Record on Appeal (grafted after the Petition for Rehearing was filed) show medical expenses have been paid, he has not proffered any evidence to substantiate his claims regarding payment of bills for specific services. As noted in the Return to Motion to Supplement the Record (A. p.110) and herein above, the Respondents provided Frampton with two visits to Doctors Care in September 2010, his workers’ compensation claim was closed by September 28, 2010. Frampton’s claim was not reopened until July 8, 2011, after Frampton alleged a new injury to his neck as a result of a motor vehicle accident in Florida while operating a state vehicle and after he wrote to the former Director of the State Accident Fund alleging an injury to his neck on November 4, 2010. (A. p.353, pp.432—433). Thereafter, medical expenses were paid by the Respondents without further agreement or order of the Commission. Also included in the Respondents’ reported payments is their own expenses in the subsequent defense of the claim, including legal fees and costs. (A. p.482—489). Importantly, the payment of medical expenses was made prior to the Respondent’s Form 51 and Form 58 specifically denying Frampton’s claim for benefits.

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

On its face, S.C. Code Ann. § 42-9-35 governs "Compensation and Payment Thereof" (the chapter title) when there is "Evidence of pre-existing injury or condition" (the code section title). This statute clearly and unequivocally requires that "[t]he employee shall establish by a preponderance of the evidence, including the medical evidence that...the subsequent injury aggravated the pre-existing condition..." (emphasis added). This plain language clearly indicates that there is no condition precedent to the application of S.C. Code Ann. § 42-9-35 other than the existence of a pre-existing condition. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)).

Similarly, S.C. Code Ann. § 42-9-35 makes no distinction between accidents that are admitted, rather than denied. Furthermore, simply because the Respondents admitted Frampton's September 4, 2010 dove field allegations⁸ met the requirements of S.C. Code Ann. §

⁸ See A. pp.215—216.

42-1-160, Frampton's burden of proof under S.C. Code Ann. § 42-9-35 was in no way excused, as these are separate statutes governing separate issues. At no time did the Respondents concede that the requirement of § 42-9-35 had been met, nor did Frampton make any attempt to prove that the condition for which he seeks permanent disability compensation is causally-related to the events in the dove field on September 4, 2010, as opposed to his pre-existing condition.

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

Frampton's tortious argument regarding his own unfounded opinions regarding the legislative history and statutory construction of S.C. Code Ann. § 42-9-35 are neither compelling, nor preserved for appeal (having been raised for the first time in a Petition for Rehearing). According to Frampton's new argument⁹, which was never properly raised before the Commission or the Court of Appeals, “42-9-35 was not enacted to create an additional

⁹ *See* Rule 207(b)(1)(B) (“[o]riginally, no point will be considered which is not set forth in the statement of issues on appeal”); *see also Rodney v. Michelin Tire Corp.*, 320 S.C. 525, 466 S.E.2d. 357 (1996) (holding that issues not raised to the Workers' Compensation Commission are not preserved for appeal).

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

In 2007, legislation including S.C. Code Ann. § 42-9-35 was introduced following the recommendations of Governor Sanford’s Task Force on Workers’ Compensation Reform.¹⁰ One of central foci of the Task Force had been the Commission’s seemingly unfettered authority to award compensation benefits in the absence of competent proof of causation.¹¹ To ensure that benefits were only awarded upon proof by medical evidence, the Legislature amended or enacted requirements of proof by “expert opinion or testimony stated to a reasonable degree of medical certainty” in all medically-complex cases (S.C. Code Ann. § 42-9-160(E)), all claims of repetitive trauma (S.C. Code Ann. § 42-1-172), all occupational disease claims (S.C. Code Ann. § 42-11-10), all claims for medical benefits beyond ten weeks (S.C. Code Ann. § 42-15-60), and all claims for compensation where there is evidence of a pre-existing condition (S.C. Code Ann. § 42-9-35).¹²

¹⁰ The undersigned was a member of the Governor’s Task Force on Workers’ Compensation Reform.

¹¹ The final Report and Recommendations of the Task Force identified the following recommendations: “[c]odify standard burden of proof by a preponderance of competent evidence” and “[r]equire expert medical opinions on issues of causation, where contested, and on permanent impairment to be stated “to a reasonable degree of medical certainty.” Otherwise, awards are speculative.”

¹² The summary accompanying S0332, introduced in Senate Session 117 (2007), which was enacted (Act 111) during that same session, states the purpose of S.C. Code Ann. § 42-9-35 is “TO PROVIDE THAT THE EMPLOYEE SHALL ESTABLISH BY THE PREPONDERANCE OF THE EVIDENCE, INCLUDING MEDICAL EVIDENCE, THAT THE SUBSEQUENT INJURY AGGRAVATED THE PREEXISTING CONDITION OR PERMANENT PHYSICAL IMPAIRMENT OR THE PREEXISTING CONDITION.” (emphasis original). See also, Hartzell v. Palmeito Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016) (explaining the purpose of the 2007 amendment to S.C. Code Ann. § 42-15-60 was “a requirement for expert

Frampton's argument that S.C. Code Ann. § 42-9-35 is merely an apportionment statute¹³, or that it does not apply where the threshold requirements of S.C. Code Ann. § 42-1-160 have been met, are not only devoid of evidentiary support and unpreserved for appeal, but improper in light of the legislative history and the plain language of the statute itself. Section 42-9-35(A) makes clear and unambiguous that all employees with a pre-existing condition are subject to a heightened burden of proof. When, as here, the "statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994); *see also* Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (holding "use of the words 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). Accordingly, both the Workers' Compensation Commission and the Court of Appeals properly applied the mandatory terms of § 42-9-35 to the undisputed facts of this case in concluding that Frampton is not entitled to any benefits.

IV. Substantial evidence supports the Commission's finding that the September 4, 2010 accident did not aggravate Frampton's pre-existing neck problem.

According to the Court of Appeals, the Workers' Compensation Commission's findings of fact regarding Frampton's pre-existing neck problems and his failure to present any medical

medical evidence to support an award...and limited the Appellate Panel's broad discretion" and holding that this heightened burden of proof applied irrespective of whether the claim was admitted or denied).

¹³ To the extent that S.C. Code Ann. § 42-9-35 governs "apportionment," it makes clear that no compensation is apportioned to an employee with a pre-existing condition in the absence of proof by expert medical evidence stated to a reasonable degree of medical certainty that the work accident aggravated his pre-existing condition.

evidence that the September 4, 2010 dove field incident aggravated those pre-existing problems are supported by substantial evidence in the record. These findings include detailed recitations of the evidence of his pre-existing neck and arm pain (including treatment by a neurologist, narcotics, nerve studies, and an MRI scan) (A. pp.211—212 #2; p.427; pp.437—438; pp.442--448); Frampton's own statement to Dr. Bailey that his "problems began on February 20, 2010" (A. p.212 #3; p.450); his admission to Dr. Keffer that he "had these problems 'for years'" (A. p.212 #4; p.452), that Frampton's testimony was not "very credible with regard to the extent of his pre-existing neck condition" (A. p.212 #5; p.265, l.21—p.265, l.13), and that

"Dr. Bailey...never addressed the issue of whether the alleged accident on September 4, 2010 aggravated the pre-existing neck and right arm condition for which he had previously treated [Frampton] and there are no other documents, records of other material that address this issue in the Record of this claim." (A. p.212 #6; p.213 #7).

Frampton did not appeal any of these findings, which the Court of Appeals properly concluded are supported by substantial evidence in the record. (A. p.12). In addition, Frampton raised no argument with respect to the substance or foundation of these findings in his Petition for Rehearing or his Petition for Writ of Certiorari. Therefore, there can be no question that the Commission's findings are the law of the case and entitled to preclusive effect in any future proceedings. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d (1997) (holding that an unchallenged ruling, right or wrong, is the law of the case); Continental Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808 (Ct. App. 1997) (stating that a lower court's unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct).

Therefore, based upon substantial evidence and the applicable 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 Supreme Court were to render judgement in Frampton's favor and conclude that S.C. Code Ann. § 42-9-35 is inapplicable, Frampton nonetheless would not be entitled to any benefits under S.C. Code Ann. § 42-9-30 because he did not prove causation for his alleged disability. Respectfully, the Petition for Writ of Certiorari should be denied because the appellate courts traditionally do not concern themselves with moot or speculative questions. *See Sloan v. South Carolina Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008); *see also Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (holding that an appellate court will not pass judgment on a matter when no actual controversy capable of specific relief exists).

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

Commissioner Taylor specifically concluded, “[Frampton] did not meet his burden of proof under S.C. Code Ann. § 42-9-35.” (A. p.195 #2). Frampton's Form 30, Request for Commission Review, makes no mention of this conclusion (or the findings upon which it is based), Frampton raised no argument with regard to the application of S.C. Code Ann. § 42-9-35 in his brief to the Commission's Appellate Panel, and Frampton otherwise failed to even dispute the issue in his Brief in Reply to the Respondent's appeal to the Appellate Panel. (A. p.225, pp.228—231).¹⁴ He simply claimed that § 42-9-35 does not apply to him.

¹⁴ Commissioner Taylor also made a specific finding of fact regarding Frampton's credibility (or rather, *lack thereof*) regarding this seminal issue under S.C. Code Ann. § 42-9-35: “I do not find [Frampton's] testimony to be very credible with regard to the extent of his pre-existing neck condition.” (A. p.193 #15). This finding was not disputed before the Commission's Appellate Panel. (A. p.210; p.212 #5).

Because the Frampton failed to meet his burden of proof under S.C. Code Ann. § 42-9-35 and because an award of benefits under the Act must be necessarily predicated on meeting this statutory burden, the Appellate Panel properly concluded that Frampton is not entitled to any additional benefits under the Workers' Compensation Act as a matter of law. However, based upon their own view of the greater weight of the evidence in the record, the Appellate Panel went on to find that there was absolutely no medical evidence that the September 4, 2010 dove field incident aggravated Frampton's documented pre-existing condition. (A. p.213).

While the Respondents respectfully contend that "an unappealed ruling, right or wrong, is the law of the case,"¹⁵ both the Commission's Appellate Panel and the Court of Appeals specifically addressed the evidentiary basis for the findings of fact and rulings of law under S.C. Code Ann. § 42-9-35, despite Frampton's failure to preserve this issue for appeal. In fact, the majority Opinion of the Court of Appeals makes no reference to the "law of the case doctrine"¹⁶ or issue preservation generally, but instead reviewed the Commission's findings and conclusions based upon the standard of review set forth by the Administrative Procedures Act. According to the majority Opinion, "...[t]here is **substantial evidence** supporting the appellate panel's

¹⁵ See Atlantic Coast Builders v. Lewis, 398 S.C. 323, 329 (S.C. 2012) (citing Buckner v. Preferred Mut. Ins. Co., 225 S.C. 159 (1970)).

¹⁶ The dissenting opinion of the Court of Appeals does argue that Commissioner Taylor's findings of fact may not be the "law of the case" because "there was no reason for Frampton to appeal." The dissent did not cite any authority for this proposition. Moreover, while Commissioner Taylor may have awarded Frampton benefits, her findings and conclusions as to § 42-9-35 were not favorable to Frampton; therefore, he had an absolute obligation to seek review should he desire not to be bound by them. As explained by the Court of Appeals in Lindsay v. Lindsay, 328 S.C. Code 329, 491 S.E.2d 583 (1997) – a case cited with approval by the dissent -- when "neither party has challenged certain trial court rulings...such rulings are the law of the case...Specifically the trial court's findings...are unchallenged and are the law of the case." (citing Biales v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993); Dwyer v. Torn Jenkins Realty, Inc., 289 S.C. 118, 344 S.E.2d 886 (Ct.App.1986)).

decision” (emphasis added) (A. pp.11—12), and the majority thereafter recited that evidence. Therefore, the Court of Appeals went far beyond the legal ramifications of Frampton’s failure to perfect his appeal and concluded substantial evidence supports the Appellate Panel’s findings of fact on the seminal issue of causation, necessitating affirmation. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (holding an appellate court must affirm the Commission’s findings if they are supported by substantial evidence). Without proof of causation, Frampton is not entitled any disability benefits under S.C. Code Ann. § 42-9-30 as a matter of law.

VI. S.C. Code Ann. § 42-9-35 properly applies to the undisputed facts of this claim.

Frampton argues that by neglecting to appeal Commissioner Taylor’s findings and conclusions regarding S.C. Code Ann. § 42-9-35 because he believed it unnecessary, he is not bound by them. There is no merit in this contention, nor is there merit in Frampton’s argument that findings and conclusions bearing on S.C. Code Ann. § 42-9-35 are not “the law of the case” because the rule somehow applies only to appellants. Of course, Frampton cites no authority for this bold proposition¹⁷, which is plainly contrary not only to generations of case law, but also to S.C. Code Ann. § 42-17-90, which mandates that a Hearing Commissioner’s Order “is conclusive and binding as to all questions of fact” if there is no timely review of these findings. Therefore, it is Frampton who misapprehends the concepts of issue preservation and additional sustaining grounds, not the Commission or the Court of Appeals.

Frampton clings to the liberality afforded respondents to raise “additional *sustaining* grounds” on appeal in accordance with Rule 220(c), S.C.A.C.R., which states “[t]he appellate

¹⁷ Frampton does cite Jasper County Board of Education v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990), for the definition of “prevailing party;” however, this case did not deal with issue preservation whatsoever, but instead defined the term in the context of statutory attorney fees. Therefore, the Jasper decision is not relevant.

court may *affirm* any ruling, order decision, or judgment upon any ground(s) appearing in the Record on Appeal.” Clearly, the operative word is “affirm.” What Frampton now advocates is a policy permitting “reversal” on grounds not raised below and not appearing in the Record.¹⁸ Not only is this antithetical to S.C. Code Ann. § 42-17-90 and the entire concept of finality, but also ignores the fact that Frampton has abandoned any challenge to these findings on appeal. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that an issue not argued in the brief is deemed “abandoned” and will not be considered by the appellate court). Moreover, Frampton’s reliance on FOn, LLC v. Town of Mt. Pleasant is misplaced, as that case clearly states that even “a respondent may abandon an additional sustaining ground...by failing to raise it in the appellate brief.” 338 S.C. 406, 526 S.E.2d 716 (2000) (citing Maxey v. R.L. Bryan and Co., 295 S.C. 334 (Ct. App. 1998); May v. Hopkinson, 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986), and Rule 208(b)(1)(B), S.C.A.C.R..

Frampton did not challenge Commissioner Taylor’s findings before the Appellate Panel¹⁹, he did not challenge them in his Brief to the Court of Appeals, he did not challenge them in his Petition for Rehearing, and he does not now challenge them in his Petition for Writ of Certiorari. Therefore, regardless of whether the Court of Appeals sustained the Commission’s

¹⁸ South Carolina appellate courts do not recognize the “plain error rule,” under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); Kennedy v. South Carolina Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001). Indeed, “an appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record...” and “[a]n appellate court may not, of course, *reverse* for any reason appearing in the record” (emphasis added) FOn, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (S.C. 2000).

¹⁹ In his Briefs to the Commission’s Appellate Panel, Frampton made no claim to have satisfied the requirements of S.C. Code Ann. § 42-9-35 – not even as an additional sustaining ground in response to the Respondent’s appeal expressly raising this very issue.

findings of fact based on substantial evidence (as stated in the majority opinion), or because no party ever challenged or disputed these findings, the fact remains they are conclusive and binding on the parties pursuant to S.C. Code Ann. § 42-17-90 and fatal to any disability claim under S.C. Code Ann. § 42-9-30 by virtue of S.C. Code Ann. § 42-9-35 and Frampton's failure to prove the essential element of causation.

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

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

Furthermore, the Respondents did not obtain Frampton's prior medical records, detailing the extent of his pre-existing injury and treatment, until the eve of the hearing. At the call of the hearing on July 15, 2015 with Commissioner Taylor, counsel for the Respondents clearly and

unequivocally raised Frampton's burden of proof under S.C. Code Ann. § 42-9-35 and his failure to prove an aggravation of his pre-existing condition:

"It's our position that any injury Mr. Frampton sustained on September 4, 2010, while walking through a dove field was simply a cervical sprain or strain...It is our position that there is no evidence that [Frampton] sustained any additional injury or exacerbated his known pre-existing condition as a result of the September 4, 2010, accident.

[Frampton] has a known pre-existing condition, as indicated in Dr. Bailey's records. Dr. Bailey diagnosed him with a C6-7 radiculopathy approximately six months prior to the dove field incident. **[Frampton] has a burden of proof by a preponderance of the evidence that that pre-existing condition was aggravated or exacerbated. We don't believe he's met that burden of proof.**" (A. p.254, l.21—p.255, l.15) (emphasis added).

Frampton did not object to this issue being raised at the hearing, nor did Frampton seek an adjournment or postponement to obtain the necessary proof, or to otherwise challenge the medical evidence bearing on this issue. (A. p. 258; p.281, ll. 13—14; p.283, ll. 1—2). *See* S.C. Code Reg. 67-612(J).

Therefore, the issue was tried by implied consent²⁰ and Frampton was questioned at length about his pre-existing condition, which he denied having, and the dearth of evidence supporting any aggravation, both by his own attorney and by the Respondents. (A. p.264, l.20—p.265, l.8; p.276, ll.7—12; p.279, l.21—p.283, l.9; p.288, l.13—p.293, l.1). In addition, Frampton's attorney stipulated to the admission of medical records documenting Frampton's pre-existing condition and the lack of causal-connection to the dove field incident. (A. pp.427—440;

²⁰ "The rule that a theory must be raised in the pleadings is inapplicable when an issue is tried by consent of the parties, either express or implied." Toal, *et al.*, *APPELLATE PRACTICE IN SOUTH CAROLINA*, p.65 (1999).

pp.444—452). Thereafter, Commissioner Taylor specifically ruled on S.C. Code Ann. § 42-9-35 and Frampton did not object, request reconsideration, or appeal either this ruling or her concomitant findings. As explained in McCurry v. Keith, 312 S.C. 254, 481 S.E.2d 166 (Ct. App. 1997), where an issue is mentioned in the opening statements and a witness is questioned without objection on that issue, the issue is tried by implied consent even if it should have been pleaded. *See also* Andrews v. Von Elten & Walker, Inc., 315 S.C. 199, 432 S.E.2d 500 (Ct. App. 1993) (holding that where the parties and the court discussed an issue at trial without objection, the issue was tried by consent of the parties). Therefore, the Writ of Certiorari should be denied, as neither the Commission, nor the Court of Appeals committed any legal error in applying S.C. Code Ann. § 42-9-35 to the unappealed, undisputed facts of this case.

VII. The Workers' Compensation Commission reversed and vacated the Hearing Commissioner's award under S.C. Code Ann. § 42-9-30 and arguments regarding that award are moot.

Commissioner Taylor's award of benefits under S.C. Code Ann. § 42-9-30 was specifically reversed and vacated by the Commission's Appellate Panel. (A. p.211, ll.8--9, p.214 #2). Because the Appellate Panel is the "ultimate fact finder and is not bound by the single commissioner's findings of fact," the previous findings of Commissioner Taylor to the contrary, along with her analysis of the issue, are irrelevant. Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). In fact, vacating Commissioner Taylor's award leaves it as if it had never been rendered – it is no longer in effect or existence. Moore v. North American Van Lines, 319 S.C. 446, 462 S.E.2d 275 (1995); *see also*, S.C. Code Ann. § 42-17-60 (requiring that an appeal lies from the final order of the Appellate Panel, not the Hearing Commissioner).

However, even if Commissioner Taylor's *vacated* award of benefits under S.C. Code Ann. § 42-9-30 were properly before the appellate courts, it is clear that the Court of Appeals properly concluded that she committed legal error by considering the fact that Frampton was earning \$102,250.00 per year as the Deputy Director of the Department of Natural Resources (and missed no time from work). (A. p.295, ll.16—17; p.193 #13). Specifically, Commissioner Taylor considered these admitted facts in the context of weighing the credibility of Dr. Bailey's opinions on impairment, which included the fallacious statement that Frampton was "unable to return to work." (A. p.367). According to Commissioner Taylor:

"[b]ased on [Frampton's] return to work and promotions received since his original date of injury, I give Dr. Bailey's revised Form 14B very little weight due to his opinion that the [Frampton] couldn't return to his current employment. That opinion is completely disproven by the facts of the case and calls into question the additional information placed in the revised Form 14B." (R. p.193 #14).

Not only was Commissioner Taylor's finding in this regard factually correct and within her discretion to weigh and judge the credibility of the evidence, but Frampton did not even appeal this finding to the Commission's Appellate Panel. (A. p.225, pp.228-230, pp.244—246).

Frampton has now raised additional issues regarding his vacated disability award under S.C. Code Ann. § 42-9-30 for the first time in his Petition for Rehearing; specifically, that the matter "should be remanded to the Appellate Panel to determine Frampton's permanent partial disability...based on the framework set forth in Clemmons" and "directed to apply the 78% regional cervical spine rating." However, Frampton never raised any such argument in his Brief to the Court of Appeals, much less to the Commission itself. While there is a lone reference in his brief to Clemmons v Lowe's Home Ctrs., Inc., 420 S.C. 282, 803 S.E.2d 268 (2017),

Frampton does not argue for its application to his own claim, but instead states, "it seems obvious that a claimant's return to work would be considered in determining whether an award of permanent and total disability is appropriate." (A. p.510, l.1). Therefore, no argument regarding the propriety of Commissioner Taylor's vacated award, including Frampton's new argument regarding Clemmons, is properly before Supreme Court by the Petition for Writ of Certiorari. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (internal citations omitted); see also State v. Oxner, 391 S.C. 132, 705 S.E.2d 51 (2011) (holding that an argument not raised to an intermediate appellate court is not preserved for review by the Supreme Court) (internal citations omitted).

Conclusion

The Respondents, the South Carolina Department of Natural Resources and the State Accident Fund, contend that the Court of Appeals properly affirmed the final Decision and Order of the South Carolina Workers' Compensation Commission based upon substantial evidence in the record and the applicable law. Therefore, because the Petition raises no special or important reasons for review, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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