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S.C. SUPREME COURT

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 App, Withdrawn, Substituted and Refiled November 18, 2020)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)

Appellate Case No. 2020-001644

Chisolm Frampton, Employee, ... Petitioner,

v.

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Arguments 2

1. Respondents accepted the claim and admitted it was compensable in their Form 51 and Prehearing Brief. 2

2. As the meaning of an "accepted case" has been a central issue throughout this appeal, Petitioners' arguments are preserved and are meritorious.. 6

3. 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 8

4. Whether substantial evidence supports the Commission's finding that Frampton failed to prove an aggravation of a preexisting condition is irrelevant as Frampton proved he suffered a loss of use of his back 11

5. The majority erred in holding the unpled defense of section 42-9-35 was tried by implied consent 13

Conclusion 15

ARGUMENT

1. Respondents accepted the claim and admitted it was compensable in their Form 51 and Prehearing Brief [In Reply to Respondents' Argument at pages 5-10.

Respondents state "While the employer may admit liability for disability benefits without a hearing, plainly that was not true in the case *sub judice.*" [Return to Petition for Writ of Certiorari, page 7]. Respondents further assert:

> [E]verything 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."

[Return to Petition for Writ of Certiorari, page 7].

These allegations are not accurate. The sole defense raised in the pleading was a subsequent intervening accident as a defense – which if proved could theoretically have superceded Frampton's disability award.[1] However, the alleged intervening accident occurred on June 16, 2011 – 3 months after Dr. Bailey had performed a two-level cervical fusion on March 21, 2011. The Commission properly rejected this defense and Respondents abandoned it on appeal.

DNR's pleadings *did not* put Frampton on notice that he would be required to prove already admitted and established facts. On their Form 51, Respondents "admit an injury to the cervical spine only; however extent of injury and all other body parts are denied. . . .Disability, if any, to be determined by the W.C.C." [App. P. 216]. These responses are typical boilerplate in a case where liability is admitted but the extent of disability to be awarded is contested.

The Form 58 (Pre-Hearing Brief) is equally innocuous. DNR argued Frampton's claim was barred by an intervening accident, but if it were not, then they argued he was not permanently and totally disabled. The Form 58 even alleges that the June 6, 2011 car accident "aggravated his *work-related injury*." [App. P. 221-223 (emphasis added]. This is completely inapposite to a denied claim.

At no point in their pleadings did DNR allege the claim was denied. Similarly, at no point did DNR's pleadings allege that Frampton had 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." [Return to Petition for Writ of Certiorari, page 6]. Respondents' statement that "everything about [their] pleadings put Frampton on notice" is

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[1]See, eg. Whitfield v. Daniel Constr. Co., 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954)("Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation." .)

demonstrably false.

Indeed, not only did Respondents' pleadings not put Frampton on notice additional proof would be required, Respondents' conduct most certainly induced him into believing his claim was fully accepted – leaving the extent of his disability compensation under § 42-9-30 as the only disputed issue. The Fund then reversed its initial denial on July 8, 2011. The Fund accepted the claim, paid for the surgery originally paid for under Frampton's health insurance, and filed reports with the Commission confirming that they were paying compensation under the Act. App. p. 474, 480-489].

As to compensation for permanent disability, the Fund's claims adjuster, Lindsay Sadler, wrote Dr. Bailey asking him to "provide both a regional cervical rating and a whole person rating." [App. p. 367-368]. Adjusters obtain impairment ratings to pay claims; not to deny them.

Even if one disregards the fact that the 150-day grace period to deny a claim had long passed (see Petition for Writ of Certiorari, page 12), everything about this case showed it to be a routine admitted claim where the parties had been unable to reach a settlement and were trying the case on damages ("Disability, if any, to be determined by the W.C.C."). An impairment rating from a physician "authorized by the Employer/Carrier to treat this Claimant for his or her injury by accident" is more than sufficient proof for a permanent partial disability award under § 42-9-30. [App. p. 367-368].

It is stunning that this is even an issue. It became an issue because Respondents – before the Appellate Panel and Court of Appeals – have persisted in promulgating the canard "that the alleged events of September 4, 2010 caused nothing more than a cervical sprain or strain injury that quickly resolved." [App. 516]. Respondents raised this patently false statement at the hearing and have persisted in repeating it in their briefs throughout the appeal. Respondents even doubled down by

supplementing the record with an inaccurate bill from Roper St. Francis Hospital to bolster their "statement to the effect that his surgery was covered-by or paid-for by the BCBS State Health Plan is factually correct." [App. P. 110-116, 122]. As an accurate copy of the hospital bills showed, Respondents statement is *not* factually correct. While BCBS initially paid the bill, the Fund paid the bill when it accepted the claim resulting in a refund being issued to BCBS. [App. P. 149-152].

The fact is Respondents admitted liability in this case, paid for the surgery, and obtained an impairment rating from the authorized treating physician for determining Frampton's permanent disability award. No matter the lengths at which Respondents are willing to go to pretend otherwise, these facts remain. "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, Argument in Defense of the Soldiers in the Boston Massacre Trials, December 1770.

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). The decision below will have far reaching implications to the workers' compensation system hindering settlement and requiring more expense and litigation. Allowing the opinion to stand will frustrate the "primary goal of the Workers' Compensation Act . . . to provide quick and efficient resolution of work-related injury claims." Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019).

2. As the meaning of an "accepted case" has been a central issue throughout this appeal, Petitioners' arguments are preserved and are meritorious [In Reply to Respondents' Argument at pages 10-11.

Respondents argue that Petitioner's argument about the meaning of an accepted case – and the specific application of § 42-9-260 – is not "preserved for appeal and are otherwise wholly without merit." [Return to Petition for Writ of Certiorari, page 10]. To the contrary, the meaning and significance of an *accepted case* is central to this appeal and has been from the outset. Although a party cannot raise a new issue on appeal nor argue an issue on a different ground than at trial, that is now what is happening here. This is the same argument on the same issue – it has merely expanded in sophistication and complexity *as a necessary response* to the misapprehension of the Court of Appeals as to the what it means when a case is "accepted" or "admitted."

Respondents are correct that § 42-9-260 was not mentioned by its specific statute number in the initial arguments.[2] There was no need to mention it at trial or before the Appellate Panel because, as the Single Commissioner found, Respondents "admitted the claim and provided medical treatment." [App. P. 191, Finding of Fact 7]. The statute became relevant on appeal when the Court of Appeals held "DNR's *initial* provision of treatment for Frampton's injury does not estop it from later contesting liability under these circumstances." As discussed in the Petition, the court apparently based this holding on the mistaken belief that DNR had only paid for the first two Doctor's Care visits. The court was mislead by Respondents' repeated allegation that Frampton's "cervical fusion surgery, which, again, was paid for under his Blue Cross Blue Shield health benefits . . ." [R. P. 9, line 25-page 10, line 1].

As Respondents' misleading allegation has now been exposed, the case must be viewed in a

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

different light. The Court is required to consider the case based on the true facts. This is no longer a case where the evidence shows the employer paid for "some treatment" at the outset, but thereafter denied the seriousness of the injury and specifically denied that the cervical fusion surgery was causally connected to the work injury. It is now a case where the employer admitted the seriousness of the injury by paying for a cervical fusion surgery and asking the authorized treating physician to provide an impairment rating for that surgery. Furthermore, it is now a case where the employer filed reports with the Commission admitting the claim and reporting that it paid for the surgery *and* paid salary in lieu of compensation. [App. 479-489].

Appellant raised § 42-9-260 because it is necessary for the Court to fully understand the legal significance of an *accepted* claim. It is not the mere fact DNR paid for "some treatment." It is the fact DNR paid for the cervical fusion surgery and, most importantly under § 42-9-260, that DNR paid *salary in lieu of compensation.* DNR is not only bound by reporting these payments to the Commission as an admission of liability; it is precluded as a matter of law by now denying liability in a case in which compensation was willingly paid *in reference to the Act* after the 150 day statute of limitations. See S.C. Code Ann. § 42-9-260 (2007)(creating a 150-day grace period during which employers could unilaterally suspend or terminate compensation for specified reasons – including when a "good faith investigation by the employer reveals grounds for denial.").

Having established that Respondents indeed accepted the case – both as a matter of fact and as a matter of law – the question raised by Respondents is whether that acceptance "effectively eliminates Frampton's burden of proof under S.C. Code Ann. § 42-9-30 or § 42-9-35." [Return to Petition for Rehearing, pages 15-16]. As to § 42-9-30, it does not. Frampton still had to prove the extent of his permanent impairment and resulting disability. This was proven by the impairment

ratings provided by Dr. Bailey, along with Frampton's testimony as to his pain and limitations. See Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017) "[T]here is no evidence in the record that Clemmons suffered anything less than a fifty percent impairment to his back. Every doctor and medical professional who assigned an AMA Guides impairment rating indicated Clemmons lost more than seventy percent of the use of his back . . .").

As to § 42-9-35, that is a different matter entirely. Frampton proved the aggravation of a preexisting condition when DNR reopened his case and paid for his cervical fusion. If he had not required surgery due to the aggravation of his preexisting condition, then DNR obviously would not have conceded this fact by accepting his case. He is not required to reprove an established fact. Cf. Deskins v. Boltin, 454 S.E.2d 322, 317 S.C. 310 (Ct. App. 1994)("A concession of a fact ordinarily has the force and effect of an established fact.").

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

3. 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 [In Reply to Respondents' Arguments at pages 11-15].

In his Petition, Petitioner explained in detail how § 42-9-35 fits into the overall statutory scheme of the Workers' Compensation Act. Section 42-9-35 must be read in context with the elimination of the Second Injury Fund and the amendments to § 42-9-170. It must also be understood – as is obvious from its plain language – as a legislative reversal of the *combined effects* doctrine

adopted in Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

Prior to the establishment of the Second Injury Fund, employees with preexisting conditions "were subjected to inequitable compensation awards through operation of the existing Workers' Compensation Act." Beard, Poteat, Bluestein, Sullivan, Williams, Burnette, *The Law of Workers' Compensation Insurance in South Carolina* (7th ed.), pages 393-394. "[C]ompensation was awarded only for the portion of the disability directly attributable to the subsequent work-related injury. Thus compensation awards in South Carolina were inadequate reflections of the employee's actual disability." Id. The Second Injury Fund was created to ensure appropriate compensation for these workers while simultaneously "removing some of the employers' qualms about hiring handicapped workers and retaining them in employment when they become partially disabled." Id.

The 2007 amendments eliminated the Second Injury Fund, yet retained a mechanism to ensure full compensation for employees with preexisting conditions. This was done by replacing the references to *additional benefits* through the Second Injury Fund in § 42-9-160 (A) with the statement "except that the employee may receive *further benefits* as provided under the provisions of Section 42-9-25." S.C. Code Ann. § 42-9-170(B) (2007)(emphasis added). This simple analysis shows that § 42-9-35 was not intended and cannot be construed to narrow a claimant's rights nor to create unreasonable burdens.[3]

Respondents do not directly address this analysis. They begin by referring to various statutes with burdens of proof. No one disputes that the employee must prove an injury by accident (including

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

an aggravation of a pre-existing condition) under § 42-1-160; further medical treatment under § 42-15-60; temporary compensation under § 42-9-260; and permanent partial disability under § 42-9-30. Of course, when the claim is accepted, additional proof is superfluous. While Respondents seek to disavow their admission of liability, the fact is they admitted Frampton (1) suffered an injury by accident aggravating a pre-existing condition; (2) needed medical treatment (cervical fusion surgery) to lessen his period of disability; and (3) was entitled to receive temporary compensation from DNR for six weeks. These benefits were willingly provided. Cf. Rock Smith Chevrolet, Inc. v. Smith, 419 S.E.2d 841, 309 S.C. 91 (Ct. App. 1992)("It has long been the policy of the court to encourage settlement in lieu of litigation . . .").

Respondents argue that § 42-9-35 creates "an additional, heightened burden of proof" on all workers with preexisting conditions. And if such specific proof is not adduced *even at the end of an admitted case*, then the employee is barred from receiving *any* compensation for permanent disability. Under their interpretation, even an employee who undergoes cervical fusion surgery *as a direct result of his work injury* in an admitted case is barred from compensation. For a system designed "to avoid any incongruous or harsh results," this callous construction is strikingly out of place. Had the Legislature intended such a result, it would have stated as such in plain language rather than rephrasing Ellison and providing for "further benefits."

At most Frampton had a dormant nondisabling preexisting condition.[4] He "incur[red] a subsequent disability from an injury arising out of and in the course of his employment." S.C. Code

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

Ann. § 42-9-35 (B)(2007). Nowhere in the statute does it state he must prove an aggravation to recover compensation for the *subsequent disability*. What the statute does state is the "commission may award compensation benefits . . . for the resulting disability of the permanent physical impairment or preexisting condition ***and*** the subsequent injury." Id. (emphasis added). This is the legislature's pronouncement of the *Full Responsibility Rule.* This is the only reading that makes sense, for otherwise what would be the purpose of requiring proof that the preexisting condition affect the subsequent injury, let alone considering a comorbidity like diabetes to be a preexisting condition?[5]

An interpretation of § 42-9-35 as requiring "an additional, heightened burden of proof" for an injured worker to receive *any* compensation for a permanent disability is unfair, untenable and unreconcilable with the statutory language, intent of the legislature and beneficient purpose of the Act. Not only is it simply wrong, but it also would inject a procedural nightmare into the Workers' Compensation system requiring unnecessary expense and complication while rewarding gamesmanship and trial by ambush. Therefore, Petitioner requests the Court issue the writ to reverse the erroneous construction of § 42-9-35 by the majority opinion in the Court of Appeals.

4. Whether substantial evidence supports the Commission's finding that Frampton failed to prove an aggravation of a preexisting condition is irrelevant as Frampton proved he suffered a loss of use of his back [In Reply to Respondents' Arguments IV and V at pages 15-19].

Respondents argue as an additional sustaining ground that the "Commission's finding of fact regarding Frampton's pre-existing neck problems and his failure to present any medical evidence that

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[5]The preexisting condition referred to in Ellison need not be to the injured body part. Ellison injured his leg. His pre-existing physical conditions included "hypertension, sleep apnea, prostate cancer, diabetes, and congestive cardiac disease which, in combination with his workplace injury, rendered him physically unable to return to work after his accident." Ellison v. Frigidaire Home Products, 371 S.C. 159, 638 S.E.2d 664 (2006).

the September 4, 2010 dove field incident aggravated those pre-existing problems are supported by substantial evidence in the record." [Return to Petition for Writ of Certiorari, pages 15-16]. Respondents assert that even if the Court finds "§ 42-9-35 is inapplicable, Frampton 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." [Return to Petition for Writ of Certiorari, page 17].

To be clear, Petitioner acknowledges that Dr. Bailey's medical records do not discuss the dove field accident. This is hardly surprising. Causation and aggravation were not issues to Dr. Bailey when he originally treated Frampton under health insurance. Once the Fund accepted the case and paid the medical bills for the surgery, they effectively admitted causation and aggravation, thus obviating the need to obtain causation opinions from Dr. Bailey. Had Frampton been on notice of a failure in his proof, he would have been entitled to 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).

If the Court ultimately decides Frampton was required to produce medical evidence of an aggravation under Respondents' reading of § 42-9-35, then the appropriate decision would be to allow Frampton leave to obtain such proof under Brown with a remand to the Commission to consider the evidence. Conversely, if the Court holds § 42-9-35 does not create "an additional, heightened burden of proof" on all workers with preexisting conditions or is otherwise inapplicable to this case, Frampton should still receive a permanent partial disability award.

Frampton produced medical evidence from the authorized treating physician that the injury and resulting surgery left him with a regional cervical spine impairment rating of 78%. [R.p. 183-

184]. He plainly met his burden of proof to qualify for a permanent partial disability award under § 42-9-30. Given that Respondents admitted the claim and paid for the surgery, an aggravation of the preexisting condition should be deemed to be admitted. Even if it is not, then under the principles of statutory construction, § 42-9-35 should not be read to bar him from compensation altogether. That would be an absurd result completely inconsistent with the liberal construction to be given the Act. The Court should grant the Petition.

5. The majority erred in holding the unpled defense of section 42-9-35 was tried by implied consent [In Reply to Respondents' Arguments at pages 19-23].

The majority held: "the issue of whether Frampton's dove-field injury was compensable under § 42-9-35 was *litigated at the hearing by implied consent . . .*" 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). Noting that § 42-9-35 "should have been raised in the Form 50, Form 51, or the Form 58 pre-hearing briefs" and "was not raised until the contested-case hearing itself,"[6] the majority nonetheless summarily concluded that "[o]nce the hearing began, Frampton's claim was structured as a § 42-9-35 claim without objection . . ." Id.

Respondents piggyback onto this analysis arguing "the issue was tried by implied consent 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." [Return to Petition for Writ of Certiorari, pages 22].

It is not clear what the Court of Appeals meant when it said Frampton's "claim was

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[6]In reality, the first mention of § 42-9-35 appeared in the Single Commissioner's Order – drafted by Respondents' counsel.

structured as a § 42-9-35 claim . . ." Frampton's counsel plainly did not recognize the case was now denied, as he elicited the normal proof on direct one would expect in a trial on damages only.

DNR's attorney cross-examined Frampton on numerous points, most of which appeared to be attacks on his credibility.[7] DNR introduced prior medical records without objection from Frampton; yet there was no contemporaneous argument that the prior records were to bolster an unpled § 42-9-35 defense. There is no basis for the Court of Appeals to have ruled that Frampton was "conscious of the relevance of the evidence to issues not raised by the pleadings [because] the relevance [was] 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).

Respondents argue Frampton's "arguments that he was unaware S.C. Code Ann. § 42-9-35 applied to his claim for compensation . . . are specious." [Return to Petition for Writ of Certiorari, pages 22]. To the contrary, as Frampton's counsel succinctly stated to the Appellate Panel, "This is an accepted case. How many times do you have to prove an accepted case." [App. 33, lines 21-22]. This Court has never addressed the meaning and purpose of § 42-9-35. The Court of Appeals has referenced the statute in *dicta* where, admittedly, it has presumed the language did require medical proof of an aggravation of a preexisting condition. However, none of those circumstances were like the instant case where a claim was admitted (including neck surgery), yet the Appellate Panel denied all compensation for the resulting permanent disability on a unique interpretation of

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[7]Frampton was cross-examined on prior treatment with Dr. Bailey; the letter he wrote to the director of the Fund with the wrong accident date; intake forms at Dr. Bailey's office after the work accident; his promotions and salary increases at DNR since the surgery; a car accident after the surgery on June 16, 2011; and his current condition.

§ 42-9-35. Given this scenario, it cannot be concluded as a matter of law that Frampton impliedly consented to a trial on this issue knowing that he could not prevail without the evidence needed to meet his "additional, heightened burden of proof" – proof he could have obtained as a matter of right by simply requesting a continuance.

In every respect, this case involves a novel and important legal issue. Both the interpretation of § 42-9-35 and the holding on trial by implied consent in a workers' compensation hearing have not been addressed by this Court. As these issues merit a full examination by this Court, Petitioner requests that the Petition for Writ of Certiorari be granted.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari and permit further briefing of the issues.

Respectfully Submitted,

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