South Carolina Bar
Continuing Legal Education Division

2026 SC BAR CONVENTION

Workers' Compensation Section

"Staying in the Know-Trends and Current Issues Facing Workers' Compensation Practitioners Today"

Thursday, January 22

SC Supreme Court Commission on CLE Course No. 260130

South Carolina Bar

Continuing Legal Education Division

In the Know-Current Trends, Issues, and Obstacles Facing Workers' Compensation Practitioners Today

Derrick Williams
Shannon Poteat
Jason Lockhart
&
Dewanna Looper

No Materials Available

South Carolina Bar

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What's New with MSA's: The New Guidelines of Medicare Set Asides

Daniel Hayes

MEDICARE SET ASIDES: SIGNIFANT CHANGES TO CMS GUIDELINES SINCE JANUARY 2024

SOUTH CAROLINA BAR CONVENTION

JANUARY 22, 2026

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TOPICS:

SECTION 111 – CIVIL MONETARY PENALTIES

TPOC – MSA AMOUNT
NO FORMAL ZERO-DOLLAR MSA REVIEW
AMENDED REVIEW OF CMS DECISION

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BONUS SLIDE

- Starting Point: Is Claimant a Medicare Beneficiary?
- Best Documentation = Medicare Card ("red, white, and blue card")
- Coordination of Benefits & Recovery Call Center: 855-798-2627.
  - Press 2 – Calling about a Medicare beneficiary or as an authorized representative;
  - Press 4 – Calling as agent, other representative, or authorized representative;
  - Press 1 – Obtain Medicare coverage status
- Need SSN (or HICN); DOB; first 5 letters of last name; 5-digit zip code
- Will confirm whether Medicare is primary for some or all claims.
- If further prompted, will verify what coverage available and effective dates; may determine coverage on specific dates

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SECTION 111: CIVIL MONETARY PENALTIES

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CIVIL MONETARY PENALTIES - IMPORTANT DATES

- **Only carriers have reporting obligations to CMS**
- January 18, 2024: Final Rule Published: "Certain Civil Monetary Penalties"
- October 11, 2024: Effective/Applicable Date
  - 365-day "clock" began to run for timely reporting
- October 11, 2025: Compliance review period begins
- April 1, 2016: Quarterly compliance audits begin

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CIVIL MONETARY PENALTIES - AUDITS

- Random sample of 250 new cases per quarter (1,000 per year)
- Pro rate number of NGHP (liability, WC, no fault) and GHP
- CMS will conduct the audits (not through contractors)
- Will audit either ORM or TPOC reporting—not both—for **timeliness** of reporting
- Audits will only occur prospectively (no audits for reporting prior to 10/11/2024)
- Tiered levels of penalties ($250 <2 years, $500 <3 years, $1000 >3 years)

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WHAT IS REPORTED?

- If claim involves a Medicare beneficiary, must report ORM and TPOC
  - ORM = Ongoing Responsibility for Medicals
  - TPOC = Total Payment Obligation to Claimant ("clincher")

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ONGOING RESPONSIBILITY FOR MEDICALS

- ORM = Ongoing Responsibility for Medicals
  - Plan's responsibility to pay, on an ongoing basis, for a Medicare beneficiary's medical case associated with a claim
    - If WC claim admitted, then ORM = "yes"
    - If WC claim denied, then ORM = "no"
  - Once indicated "yes," cannot change to "no"
    - ORM must be terminated or will continue indefinitely

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CIVIL MONETARY PENALTIES - ORM

- Trigger for reporting ORM: When RRE learns, though normal diligence, that beneficiary has received (or is receiving) medical treatment related to the injury or illness sustained
- Effective date for payments is D/A, regardless of when treatment actually started or when ORM reported
- Report within 365 days of accepting primary payer responsibility ("yes")
  - Accepted as compensable from D/A
  - Initially denied, then subsequently accepted
  - Medicals awarded at hearing
  - Once ORM is "yes" it cannot be changed to "no"
    - Must be terminated or will continue indefinitely

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TOTAL PAYMENT OBLIGATION TO CLAIMANT

- TPOC = Total Payment Obligation to Claimant
  - Dollar amount of a settlement, judgement, award, or other payment
  - TPOC is distinct from ORM
    - Both carry potential civil monetary penalties for late reporting
  - Generally, a one-time lump sum amount paid to an injured party to resolve a payment obligation
  - Must resolve future medical portion of claim
  - Examples: Full and final WC "clincher" settlement; liability release

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CIVIL MONETARY PENALTIES - TPOC

- TPOC reported once following criteria are met:
  - Individual to whom payment will be made has been identified
  - TPOC amount has been determined
  - RRE knows when TPOC will be funded or disbursed to the individual or representative
- Timeliness will be based upon the latter of the TPOC Date and the Funding Delayed Beyond TPOC Start Date

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CIVIL MONETARY PENALTIES - CALCULATION

- > 1 years but < 2 years = $250 penalty per day per record
- > 2 years but < 3 years = $500 penalty per day per record
- > 3 years = $1000 penalty per day per record
- Total penalty for any 1 instance of noncompliance = $365,000
- ORM and TPOC are separate reporting records
- 2024 Inflation-Adjusted Rates:
  - $1000 = $1428
  - $500 = $714
  - $250 = $357

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CIVIL MONEY PENALTIES – EXAMPLE

- Hypothetical from CMS Town Hall Meeting:
  - RRE randomly selected for audit
  - Record (ORM "Y" or TPOC) reported 410 days after date it should have been reported, instead of less than 365 days later
  - Record is 45 days late
  - RRE will receive Informal Notice identifying noncompliant (untimely) record
    - $250 times 45 days = $11,250
    - However, $11,250 adjusted for inflation becomes $16,056 potential civil monetary penalty

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CIVIL MONEY PENALTIES – STATUTE OF LIMITATIONS

- 28 USC Section 2462
- Statute of Limitations = 5 years
- Clock begins to run when record is actually reported, or when CMS obtains information that could reasonably lead to discovery of noncompliance (such as a corresponding self-report)

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CIVIL MONETARY PENALTIES - MITIGATING FACTORS

- Process will be outlined in CMS correspondence with RRE
- Noncompliance beyond RRE's control (i.e., timeframe allowed for claimant to report)
- ORM in dispute (with evidence supporting late report)
- CMS changes reporting requirements and/or process without adequate notice (less than 6 months)

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CIVIL MONETARY PENALTIES - MITIGATING FACTORS

- Cannot verify plaintiff/claimant's Medicare status:
- Documented evidence of a beneficiary's failure to provide information:
  - Reach out 3 times – once in writing; once by mail; once by phone or any other reasonable method
  - If beneficiary unambiguously indicates a refusal to provide information, no further efforts are needed
    - RREs must submit Medicare Health Insurance Claim Number (HICN) or Medicare Beneficiary Identifier (MBI) or Social Security Number (SSN) for the injured party
      - Only need last 5 digits of SSN
  - Consider using CMS's form to request information

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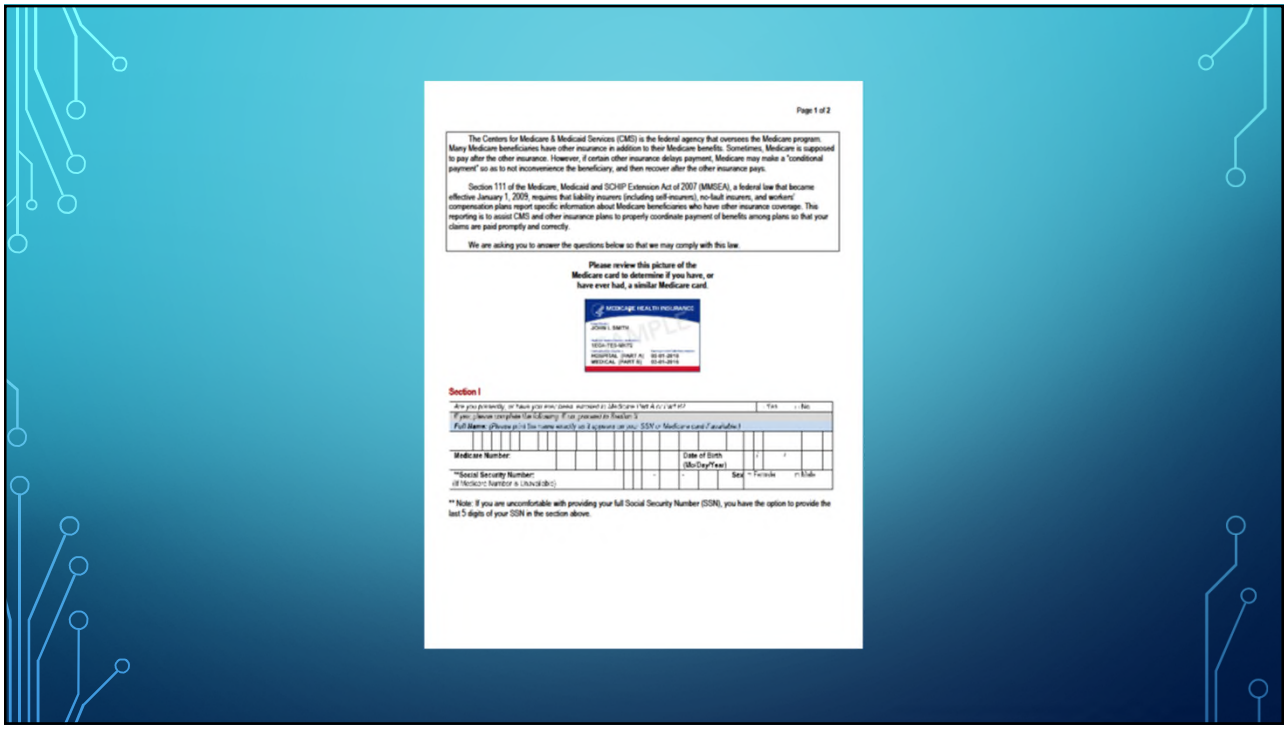

Page 1 of 2

The Centers for Medicare & Medicaid Services (CMS) is the federal agency that oversees the Medicare program. Many Medicare beneficiaries have other insurance in addition to their Medicare benefits. Sometimes, Medicare is supposed to pay after the other insurance. However, if certain other insurance delays payment, Medicare may make a "conditional payment" so as to not inconvenience the beneficiary, and then recover after the other insurance pays.

Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), a federal law that became effective January 1, 2009, requires that liability insurers (including self-insurers), no-fault insurers, and workers' compensation plans report specific information about Medicare beneficiaries who have other insurance coverage. This reporting is to assist CMS and other insurance plans to properly coordinate payment of benefits among plans so that your claims are paid promptly and correctly.

We are asking you to answer the questions below so that we may comply with this law.

Please review this picture of the Medicare card to determine if you have, or have ever had, a similar Medicare card.

Section I

Are you currently, or have you ever been covered by Medicare Part A or Part B?	Yes	No
If yes, please complete the following. If no, proceed to Section II.		
Full Name: (Please print the name exactly as it appears on your SSN or Medicare card if available.)		
Medicare Number:	**Date of Birth** (Mo/Day/Year)	/ /
***Social Security Number:** (If Medicare Number is Unavailable)	**Sex** Female	Male

** Note: If you are uncomfortable with providing your full Social Security Number (SSN), you have the option to provide the last 5 digits of your SSN in the section above.

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TPOC: MSA AMOUNT

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TPOC: MSA AMOUNT (WC SETTLEMENTS ONLY)

- Effective April 4, 2025: New reporting field to include MSA amount with TPOC
- Applies to any settlement involving Medicare beneficiary, even if not greater than $25,000
- If does not meet CMS workload review threshold (i.e., not > $25,000, CMS still **"reserves the right to review the claim to determine if the amount was appropriate"**
- What to report:
  - Set-Aside Amount (may be $0.00)
  - Lump Sum or Annuitized Funding
  - Self Administration or Professional Administration

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RECOMMENDATIONS TO SHOW AMOUNT IS APPROPRIATE

- WCMSA
  - Admitted claim with undisputed ongoing medical needs
- Zero-Dollar MSA Legal Opinion Letter
  - Denied claim or disputed entitlement to ongoing medical needs
- Cost Table
  - Based on specific ongoing medical recommendations (i.e., SCWCC Form 14B with limited future care)

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NO FORMAL ZERO-DOLLAR MSA REVIEW

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NO FORMAL ZERO-DOLLAR WCMSA REVIEW (WC SETTLEMENTS ONLY)

- January 17, 2025: WCMSA Reference Guide
- Section 4.2 "Indications That Medicare's Interests Are Protected"
- Submitting WCMSA proposal for review is never required
- WCMSA is not necessary under certain conditions that indicate Medicare's interests are already protected:
  - The facts of the case demonstrate that the injured individual is only being compensated for past medical expenses (i.e., for services furnished prior to the settlement); and
  - There is no evidence that the individual is attempting to maximize the other aspects of the settlement (e.g., the lost wages and disability portions of the settlement) to Medicare's detriment.

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NO FORMAL ZERO-DOLLAR MSA REVIEW

- These conditions may be demonstrated through one of the following:
  - (1) The individual's treating physician documents in medical records that to a reasonable degree of medical certainty the individual will no longer require any treatments or medications related to the settling WC injury or illness; or
  - (2) The workers' compensation insurer or self-insured employer denied responsibility for benefits under the state workers' compensation law and the insurer or self-insured employer has made no payments for medical treatment or indemnity (except for investigational purposes) prior to settlement, medical and indemnity benefits are not actively being paid, and the settlement agreement does not allocate certain amounts for specific future or past medical or pharmacy services as a condition of settlement; or

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NO FORMAL ZERO-DOLLAR MSA REVIEW

- These conditions may be demonstrated through one of the following (cont'd):
  - (3) A Court/Commission/Board of competent jurisdiction has determined, by a ruling on the merits, that the workers' compensation insurer or self-insured employer does not owe any additional medical or indemnity benefits, medical and indemnity benefits are not actively being paid, and the settlement agreement does not allocate certain amounts for specific future medical services; or
  - (4) The workers' compensation claim was denied by the insurer/self-insured employer within the state statutory timeframe allowed to pay without prejudice (if allowed in that state) during investigation period, benefits are not actively being paid, and the settlement agreement does not allocate certain amounts for specific future medical services.

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NO FORMAL ZERO-DOLLAR MSA REVIEW

- In addition, WCMSA is not necessary if a settlement leaves WC carriers with responsibility for ongoing medical and prescription coverage once the settlement funds are fully spent, then a WCMSA is not necessary.
- Effective July 17, 2025, CMS will no longer accept or review WCMSA proposals with a zero-dollar ($0) allocation. Entities should consider the above parameters in determining whether a zero-dollar WCMSA allocation is appropriate and **maintain documentation to support that allocation.**

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RECOMMENDATIONS FOR MAINTAINING DOCUMENTATION

- WCMSA that references medical evidence to reasonable degree of medical certainty that no future medical treatment is recommended
  - In South Carolina, Form 14B that says "no" to future treatment
- Zero-Dollar MSA Legal Opinion Letter
  - Relying upon one or more of the four conditions allowed by CMS to support a zero-dollar set-aside allocation

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AMENDED REVIEW OF CMS DECISION

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AMENDED REVIEW – WAIT PERIOD FOR FILING REMOVED (WC SETTLEMENTS ONLY)

- April 7, 2025: WCMSA Reference Guide
- Section 16.3 "Amended Review"
  - Only available once
  - CMS has already issued a conditional approval
  - Medical have not yet settled
  - Change in projected care would result in 10% or $10,000 change (whichever is greater)
  - (CMS may use opportunity to increase other items)

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THANK YOU
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Legislative Updates

Kristian Cross

No Materials Available

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View from the Commission: Thoughts and Observations

Commissioner Scott Beck

No Materials Available

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Case Law Update

Allison Sullivan
Allison Nussbaum

446 S.C. 434
Court of Appeals of South Carolina.

Meswaet ABEL, as Personal Representative of the Estate of Zerihun Wolde and as Natural Parent and Legal Guardian of Adam Wolde and Wubit Wolde, Respondent,
v.
LACK'S BEACH SERVICE, City of Myrtle Beach, and John Doe Lifeguard, Defendants,
Of which Lack's Beach Service is the Appellant.

Appellate Case No. 2023-000569
|
Opinion No. 6118
|
Heard February 12, 2025
|
Filed July 16, 2025
|
Rehearing Denied September 22, 2025

Synopsis

Background: Fiancée of swimmer who drowned at city beach brought wrongful death action against city's beach safety service provider, alleging provider was negligent in lifeguard training and staffing. After jury awarded approximately $20 million in damages to fiancée and children she shared with swimmer, including $7 million in punitive damages, the Circuit Court, Horry County, Kristi F. Curtis, J., 2022 WL 22654041, issued an order upholding the constitutionality of the punitive damages award, and subsequently, 2023 WL 10953192, denied provider's post-trial motions for judgment notwithstanding the verdict (JNOV) and new trial absolute. Provider appealed.

Holdings: The Court of Appeals, Turner, J., held that:

issue of whether provider breached standard of care for lifeguarding was for jury;

issue of whether provider's negligence proximately caused swimmer's death was for jury;

there was sufficient evidence of conscious pain and suffering at the moment of drowning to submit survival claim to the jury;

evidence of recklessness by provider created issue for jury as to whether punitive damages were warranted;

punitive damages award was not grossly excessive, as would warrant new trial;

provider was not entitled to new trial on basis that survival award was so excessive it demonstrated jury's prejudice; and

relevant considerations indicated moderate degree of reprehensibility on part of provider, as factor in determining reasonableness of punitive damages award.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Judgment Notwithstanding the Verdict (JNOV); Motion for New Trial.

Appeal From Horry County, Kristi F. Curtis, Circuit Court Judge

Attorneys and Law Firms

C. Mitchell Brown and Blake Terence Williams, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia; Joseph DuRant Thompson, III, of Hall Booth Smith, PC, of Mount Pleasant; and Elizabeth Fulton Morrison, of Whelan Mellen & Norris, LLC, of Charleston, all for Appellant.

William Mullins McLeod, Jr., and Harry Cooper Wilson, III, both of McLeod Law Group, LLC, of Charleston; George Murrell Smith, Jr., of Smith Robinson Holler DuBose Morgan, LLC, of Sumter; Austin Tyler Reed and Frederick Newman Hanna, Jr., both of Smith Robinson Holler DuBose Morgan, LLC, of Columbia; and John Christopher Pracht, V, of Pracht Injury Lawyers, LLP, of Anderson, all for Respondent.

Opinion

TURNER, J.:

***449 **291** In this wrongful death action involving a fatal drowning, Lack's Beach Service (Lack's) appeals a jury award of approximately $20 million in damages to Meswaet Abel and her four children. Specifically, Lack's appeals the trial court's denial of its post-trial motions for judgment notwithstanding the verdict (JNOV) and a new trial absolute and the award of punitive damages. We affirm.

FACTS/PROCEDURAL HISTORY

Lack's contracted with the City of Myrtle Beach (the City) as its "Water Safety Program" provider and "Concessionaire" for beach rentals. In 2018, Lack's and the City entered into a seven-year "Water Safety Franchisee" Agreement (Franchise Agreement) for the 2018-2025 seasons. The Franchise Agreement stated that Lack's would "operate a water safety service and beach concession" on the City's public beaches from April 15 to September 30, Monday through Sunday, from 8:00 a.m. to 5:00 p.m. In addition to staffing permanent lifeguard stands in eighty-nine zones across the beach, Lack's also agreed to provide "mobile lifeguards," referred to as "Lifeguard Onlys" (LGOs), at various ratios throughout the zones. [1] From the first week of June through Labor Day, Lack's was required to provide at least one LGO for every six permanent stands on the beach and one off-stand supervisor for every ten stands. The Franchise Agreement also required that each lifeguard ***450** "[s]uccessfully complete a course consisting of ... not less than 40 hours in open water life saving which [met] the criteria of the United States Life[saving] Association" (USLA). Additionally, the Franchise Agreement authorized Lack's to rent chairs, umbrellas, floats, and boogie boards; it also required Lack's to "be responsible for the cleanliness of its franchise zone(s)."

On August 23, 2018, Abel arrived at the Sea Crest Resort in the City with her father; her fiancé, Zerihun Wolde; and their four children. Around noon the next day, the family walked down to the beach using the private access from the hotel and set up their chairs and umbrellas near lifeguard stand L-22. Abel stayed on the beach with the youngest children while Wolde went into the water with the two oldest—Adam and Wubit. Abel testified she did not see any red flags or signs on the beach warning of dangerous conditions, and she observed lots of people on the beach and in the water. Abel testified that approximately thirty to forty-five minutes later, Adam came running up to her shouting that Wolde needed help. She left the other children with her father and ran down the beach to the right, past the lifeguard stand, where she saw Wolde. Abel testified that several bystanders administered assistance to Wolde, including giving him CPR, and an ambulance transported him to the hospital. When she arrived at the hospital, she was informed that Wolde had died from drowning.

Adam testified that when he went into the water with Wubit and Wolde, they were initially in waist deep water, but he soon noticed that he was "unintentionally getting deeper and deeper" until the water was up to his neck and he started treading water. He stated he was in front of his father, who was "hugging" Wubit, just out of arm's reach. Adam testified that they tried to swim back into shore but continued to be pulled further away, so all three of them began waving their arms and yelling for help as loudly as they could. Adam was able to swim safely to shore, but he became separated from Wolde and Wubit who were "still in trouble." He saw a bystander, who had seemingly heard their yells for help, making his way out into the water towards Wolde and Wubit. Adam testified that from the time he first felt the water pulling him out until the time he got out of the water, he never saw a lifeguard and no lifeguard entered the water to assist his family.

***451** Wubit testified similarly. She stated Wolde was trying to hold onto her and tread water and he yelled for help approximately twenty times. She recalled that Wolde "was struggling to keep his head above water" and ****292** would go under and come back up, "gasp," and yell for help. Wubit testified this struggle lasted around ten to fifteen minutes. She stated she could see people on the beach who appeared to be "trying to see what was going on," and eventually, three or four people came into the water, and a woman helped her to shore. Wubit asserted that, by that time, Wolde had stopped yelling and his entire body was submerged as she held onto his shirt. She testified that she did not see a lifeguard until her father was on the beach receiving medical attention.

Two bystanders, Jeffrey Bender and Julian Chandler, also testified. Bender recalled that his family was in the water near the L-21 lifeguard stand when they heard screams for help. He did not see a lifeguard, so he told his wife and children to go find one, and he went into the water toward the screams. Bender stated he reached a woman who was yelling for help; she was with a young girl, and the girl was clinging to a man who was bobbing facedown in the water. Bender flipped the man over and saw he was foaming at the mouth. Bender stated the woman carried the girl to shore while he dragged the man by the torso; he recalled fighting against a "very strong current." Bender stated he did not see a lifeguard until after Wolde was already on shore.

Chandler testified his family arrived at the beach shortly before noon and set up near the L-22 lifeguard stand. He recalled seeing a lifeguard sitting on the back of the stand talking to two people with his back to the water. [2] Chandler did not see any warning flags on the beach. Approximately five to ten minutes later, Chandler heard calls for help and saw two men and a woman assisting another man and a young

girl out of the water. He went out in the water to assist with bringing Wolde to shore. Chandler stated that when they got Wolde to the beach, "[h]e was in a very desperate situation" with "a lot of water and sand coming out of his mouth." He recalled ***452** another bystander began CPR, during which time the lifeguard he had seen by the lifeguard stand earlier appeared in the crowd; he asserted the lifeguard did "nothing" to assist Wolde. Chandler asserted the lifeguard should have been able to hear the bystanders' yells for assistance.

Chris Brewster, chairman of USLA's National Certification Committee, testified USLA sets the national standard of care for ocean lifeguards. He asserted USLA's position was that lifeguards should not be assigned any task other than watching the water while he or she is on the stand, and he stated requiring lifeguards to "sell chairs" while on the stand was inconsistent with USLA standards. Brewster explained that when Lack's first submitted its application for certification in 1995, USLA "had never received an application ... from a private lifeguard operation that was vending as well as providing lifeguards," and "a decision was made that [USLA] would allow lifeguard agencies that allowed their lifeguards to vend ... to be certified so long as the lifeguards who were assigned on the stand watching the water ... could never be involved in commerce" while on the stand. Brewster asserted that after USLA sent a letter to Lack's in January 1996 inquiring whether any lifeguards would be involved in commercial activities, he had a phone call with Lack's owner, who indicated that "none of the lifeguards assigned to the tower would be responsible for watching the water and vending goods at the same time."[3] He testified that afterwards, he was convinced that Lack's met the USLA standard and Lack's was certified. He further testified that when Lack's requested recertification periodically thereafter, Lack signed a portion of the application verifying that it would not have lifeguards watching the water and vending goods at the same time. However, when Brewster visited Myrtle Beach in 2007, he walked down the beach and observed "lifeguards who were assigned to water surveillance [who] were renting and vending." He stated he felt Lack's had lied to USLA. Brewster testified ****293** he notified the National Certification Committee of his observations and the committee undertook an investigation, which ultimately ***453** resulted in the revocation of Lack's certification due to its violation of USLA's standards.

Brewster also testified about USLA's training requirements, specifically that lifeguards "successfully complete a course consisting of not less than 40 hours" of open-water training. He explained that such training includes "recognizing what a victim in distress looks like, learning about rip currents so [lifeguards] understand what rip currents are and what somebody in distress in a rip current might look like," as well as "mock rescues" to learn to rescue victims. He asserted that "training in a manner that allows the person on the stand to be involved in vending would be inconsistent with the USLA's training standards."

Dr. Thomas Griffiths testified as an expert in aquatic safety. He stated Lack's breached the standard of care in this case by (1) requiring lifeguards to sell merchandise and clean the beach in addition to their lifeguarding duties, (2) providing sub-standard training that did not comply with the Franchise Agreement or USLA standards, (3) failing to warn beachgoers of known hazardous conditions or to close the affected sections of the beach, (4) failing to recognize Wolde as a distressed swimmer, and (5) understaffing the beach on the day of the incident. Specifically, Dr. Griffiths pointed out that Lack's training fell short of the forty hours required by the Franchise Agreement and was conducted improperly. He noted that records for the lifeguards on stands L-20, L-21, and L-22 were either incomplete or stated training had taken place on dates the lifeguards were not in Myrtle Beach. He stated that based on the personnel records he reviewed, it did not appear that the lifeguards had enough time to complete the forty hours of training between the time they arrived in Myrtle Beach and when they began their lifeguarding duties. Dr. Griffiths also opined that all lifeguards should be "lifeguard onlys" and based on the dual role required by Lack's, their training could not comply with USLA standards. Additionally, he noted that on the day of the drowning, Lack's received a rip current warning at approximately 10:00 a.m., but there was no evidence Lack's put up additional warnings or closed affected portions of the beach. Dr. Griffiths asserted that Wolde "was a distressed victim that could have and should have been easily recognizable by attentive lifeguards" and opined that Lack's ***454** operated in a dangerous and unsafe manner, which was "a direct cause of his death."

Lack's acknowledged Abel and her family set up closest to the L-22 stand; Wolde and the older children drifted down the beach to the south; and Wolde and the children were closest to the L-21 stand when Wolde became distressed and the bystanders pulled him out of the water. It was undisputed that the lifeguard assigned to L-21 was on his lunch break at the time of the incident, leaving that stand unmanned. Lack's asserted that a red flag was up in front of the L-22 stand; however, because the lifeguard at L-21 was at lunch, there

was no flag in front of his stand. Lack's explained that the lifeguards would close their stand and remove their flags when they went to lunch, but they did not close the beach to beachgoers; rather, the lifeguards on either side were expected to watch that stretch of water or an LGO would cover it. Lack's admitted that the three lifeguards stationed at L-20, L-21, and L-22 missed several training sessions because they were not yet in the country when training began. Lack's also acknowledged that it did not have any sign-up sheets or "proof of the training" for the lifeguards involved in this incident.

Lack's asserted that it had been a "dual-role agency" for many years, which meant its lifeguards were required to engage in selling "beach concessions" as well as performing their lifeguarding duties. Lifeguards also received commissions based on their rental sales. Lack's agreed that "there is a national standard of care when it comes to lifeguards" and acknowledged the January 1996 letter from USLA stating that, in order to maintain Lack's USLA certification, it had agreed that "lifeguards assigned to water surveillance [would] not be assigned to any other duties." However, Lack's denied representing to USLA that its lifeguards would not be responsible ****294** for any other tasks; rather, it averred the agreement was "to provide [LGO] personnel" in a ratio determined by Lack's and USLA. Lack's asserted that because the Franchise Agreement specifically called for and defined LGOs, it implicitly acknowledged that its other lifeguards operated in a dual role. Lack's personnel testified that on August 24, there were only three LGOs —the only personnel whose "sole responsibility was water observation"—on a more than two-mile stretch of beach. Lack's agreed that pursuant to the Franchise Agreement ***455** staffing requirements, it was at least one LGO short that day and that the additional LGO could have made a difference if he or she had been present.

Over Lack's objection, the trial court admitted evidence regarding the sales revenue generated by the beach concessions for the month of August 2018—including the daily totals for the lifeguards at L-20, L-21, and L-22 on August 24—as well as Lack's total rental revenue for 2018. Abel also questioned Lack's regarding a 2002 workers' compensation case in which it asserted that its lifeguards engaged in beach concession duties 99.995% of the time and lifeguarding duties 0.00047% of time.

The jury found Lack's was negligent and its negligence caused Wolde's death; the jury found no negligence on the part of Wolde. The jury awarded actual damages for Wolde's conscious pain and suffering in the amount of $3.73 million and wrongful death damages of $10 million. The jury also found Lack's acted in "a reckless, willful, or wanton manner." The parties then proceeded to try the issue of punitive damages. Lack's testified it had $3 million in total insurance and, as of December 31, 2021, it had a net worth of negative $473,350.51. The jury ultimately awarded $7 million in punitive damages.

Lack's timely filed post-trial motions for JNOV, a new trial absolute, and a new trial nisi remittitur. Before a hearing could be held on the motions, the trial court issued an order upholding the constitutionality of the punitive damages award. Lack's subsequently filed a Rule 59(e), SCRCP, motion to reconsider. After a hearing on the pending post-trial motions, the trial court issued an order denying the motions. This appeal followed.

ISSUES ON APPEAL

I. Did the trial court err in denying Lack's JNOV motion?

II. Did the trial court err in denying Lack's motion for a new trial absolute?

III. Did the trial court err in upholding the jury's punitive damages award?

*456 DIRECTED VERDICT AND JNOV MOTIONS

"A motion for a JNOV is merely a renewal of the directed verdict motion." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). Therefore, "only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion." *Id.* at 331, 732 S.E. 2d at 170-71. "When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this [c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* at 331-32, 732 S.E.2d at 171. "The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." *Id.* at 332, 732 S.E.2d at 171. "Moreover, '[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.' " *Id.* (alteration in original) (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). "In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence."

Id. "An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below." *Id.*

1. Dual Role

Lack's argues the trial court erred in denying its motions for a directed verdict and JNOV because the dual-role arrangement for its lifeguards was expressly permitted by its contract with the City and pursuant to section 5-7-145 of the South Carolina Code (2004). Further, Lack's asserts "the applicable ****295** standard of care in this case was set forth in the Franchise Agreement." It also argues Abel did not produce any direct evidence that would "allow the jury to conclude that the relevant lifeguards were engaged in commercial activity at the time of the drowning." We disagree.

In cases of professional negligence, "the standard of care that the plaintiff must prove is that the professional failed to conform to the generally recognized and accepted practices in his profession." *Doe v. Am. Red Cross Blood Servs., S.C. Region*, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989). A court ***457** may "define the standard of care by looking to the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016).

Although the Franchise Agreement appears to acknowledge that some of Lack's lifeguards would engage in a dual role because it specifically provides for a subcategory of LGOs, it merely implies that dual roles will exist; it does not "expressly" approve the dual-role set up. Additionally, the Franchise Agreement does not set forth any standards or guidelines for how Lack's dual-role employees should perform their duties. Further, although a court may look to statutes for guidance as to the applicable standard, the particular statute relied upon by Lack's, section 5-7-145, does not set forth a standard of care. Section 5-7-145(B) merely states that coastal municipalities may provide lifeguard services for its beaches "using municipal employees or by service agreement with a private beach safety company." The section further provides that if the municipality elects to contract with a private company, "the municipality may grant the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality." *See* § 5-7-145(B)(3). However, the statute does not specifically authorize lifeguards to rent equipment.

Abel presented expert testimony regarding the standard of care for professional lifeguards and asserted that Lack's breached that standard by requiring its lifeguards to sell merchandise and clean the beach in addition to their lifeguarding duties. Abel further presented bystander testimony that the L-22 lifeguard was sitting on the back of the stand, facing away from the ocean, talking to two people near the "umbrella line" five to ten minutes before bystanders rendered aid to Wolde. [4] Abel also introduced sales revenue data ***458** showing that the lifeguards at L-20, L-21, and L-22 made approximately $1,100 in combined sales on the day of the incident. Moreover, Abel introduced evidence of correspondence between Lack's and USLA regarding Lack's certification. Significantly, based on the correspondence alone, we find the jury could conclude that Lack's knew the dual-role requirement was an unsafe practice and in violation of the accepted standard of care in the industry.

Therefore, we hold the trial court properly submitted to the jury the issue of whether the lifeguards' dual role breached the standard of care and was a factor in Wolde's death, and we affirm the denial of the JNOV and directed verdict motions as to this ground. *See RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 ("The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt.").

2. Standard of Care and Proximate Cause

Lack's argues the trial court erred in denying its motions for a directed verdict and JNOV because the evidence failed to establish that Lack's breached the standard of care or proximately caused Wolde's drowning. We disagree.

****296** Initially, we find Lack's arguments regarding the standard of care—other than the dual-role issue addressed above—are not preserved for appellate review because they were not raised to the trial court during Lack's directed verdict motion.

Similarly, Lack's arguments regarding proximate cause—specifically its arguments as to training and understaffing—are not preserved. *See RFT Mgmt. Co.*, 399 S.C. at 331, 732 S.E.2d at 171 ("A motion for a JNOV is merely a renewal of the directed verdict motion."); *id.* at 331, 732 S.E. 2d at 170-71 ("[O]nly the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion.").

***459** During the directed verdict stage of trial, Lack's argued *only* that Abel had failed to prove proximate cause because there was no evidence of the "amount of time the family struggled" or that "a lifeguard could get from his or her location to [ ] Wolde to change th[e] outcome." As to these two grounds, we find Abel presented sufficient evidence such that a reasonable jury could have concluded Lack's negligence proximately caused Wolde's death. *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006) ("The question of proximate cause ordinarily is one of fact for the jury, and it may be resolved either by direct or circumstantial evidence."); *Gastineau*, 331 S.C. at 568, 503 S.E.2d at 713 ("A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.").

First, Wubit testified Wolde was in distress for "a long period of time," around ten to fifteen minutes. Additionally, it was undisputed that L-21, the lifeguard stand closest to where Wolde became distressed and was ultimately pulled from the water, was not staffed at the time of the incident; however, the beach in front of the stand was not closed. Dr. Griffiths opined that Lack's breached the standard of care by failing to appropriately train its lifeguards in compliance with the forty-hour requirement and further engaged in unsafe practices by allowing lifeguards to leave their stand unattended during their lunch break without appropriate backup coverage. Further, Dr. Griffiths asserted that Wolde "was a distressed victim that could have and should have been easily recognizable by attentive lifeguards" and opined that Lack's operated in a dangerous and unsafe manner that was "a direct cause of his death." Indeed, the bystanders who ultimately pulled Wolde from the water did so because they were able to see and hear Wolde in distress in the ocean in front of the stand. Although Lack's disputed whether it did in fact provide sufficient coverage for the vacant stand, we find the evidence was such that it could yield "more than one reasonable inference," and therefore, we affirm the denial of the motions for a directed verdict and JNOV on this ground. *See Roddey*, 415 S.C. at 590, 784 S.E.2d at 676 ("The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury."); ***460** *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 ("The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt."); *id.* ("In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.").

3. Conscious Pain and Suffering

Lack's argues the trial court erred in submitting Abel's survival claim to the jury because there was no evidence of *conscious* pain and suffering. Specifically, Lack's equates Wolde's "pre-drowning struggles," as testified to by Wubit, with "pre-impact fear," which South Carolina has not recognized as an element of recoverable damages.[5] Lack's argument, somewhat confusingly, seems to imply that a person is not actively drowning unless they are unconscious or no longer resurfacing. For example, ****297** it characterizes the record as "reflect[ing] gasping and yelling *prior to* the tragic drowning," and states that "[a] struggling swimmer who recovers and comes ashore and *escapes the drowning* is not entitled to recover." Moreoever, Lack's argues expert testimony regarding the drowning process was required. We disagree.

"Damages in a survival action include recovery for the deceased's conscious pain and suffering ...." *Smalls v. S.C. Dep't of Educ.*, 339 S.C. 208, 216, 528 S.E.2d 682, 686 (Ct. App. 2000). Wubit testified that her father struggled in the water for ten to fifteen minutes—repeatedly going under, resurfacing, and "gasping" for breath. Further, bystander testimony indicated that upon his retrieval from the water, Wolde had "a lot of water and sand coming out of his mouth."

Although we could not locate any South Carolina cases directly on point, common sense dictates that the struggle to "escape the drowning" is, in fact, part of the active drowning process. Further, we could not locate any authority supporting Lack's proposition that expert testimony is required in South ***461** Carolina in order to submit the issue of pain and suffering to a jury. Thus, we hold the testimony from Adam, Wubit, Bender, and Chandler—all of whom were eyewitnesses to the drowning—was sufficient to submit the survival claim to the jury, particularly in light of the standard of review, which requires us to construe the evidence in the light most favorable to Abel, as the nonmoving party. *See RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 ("The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt."); *id.* at 331-32, 732 S.E.2d at 171 ("[T]his [c]ourt must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party."); *Smalls*, 339 S.C. at 217-18, 528 S.E.2d at 686-87 (finding "evidence existed from which the jury could have determined the

victim experienced conscious pain and suffering" when the victim's father testified that "his daughter was gasping for air and moaning somewhat" immediately after being struck by a vehicle, even though he acknowledged the daughter was unconscious when transported to the hospital and never regained consciousness before succumbing to her injuries). We therefore affirm the denial of the JNOV motion as to this ground.

4. Punitive Damages

Lack's also argues the trial court erred in failing to grant its JNOV motion because Abel failed to prove recklessness by clear and convincing evidence as required for punitive damages. We hold Abel presented sufficient evidence of recklessness to allow the issue to be submitted to the jury and to support the verdict.

"Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." *Solanki v. Wal-Mart Store No. 2806*, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014). "[R]ecklessness implies the doing of a negligent act knowingly .... [T]hat is, the conscious failure to exercise due care." *Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964) (quoting *State v. Rachels*, 218 S.C. 1, 8, 61 S.E.2d 249, 252 (1950)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is ***462** reckless or willful and wanton ...." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

Abel presented evidence that Lack's consciously failed to exercise due care in training its lifeguards and staffing the beach. Dr. Griffiths opined that Lack's breached the standard of care by failing to appropriately train its lifeguards in compliance with the forty-hour requirement and by understaffing the beach on the day of the incident with vacant stands and too few LGOs. Moreover, the Franchise Agreement stated Lack's would "operate a water safety service and beach concession" on the City's public beaches, and the lifeguards it employed would "[s]uccessfully complete a course consisting of ... not less than [forty] hours in open water life saving which [met] the criteria of the [USLA]." Lack's admitted the lifeguards involved here missed several training sessions and that it had no proof the forty hours ****298** of training was actually completed. Further, it was undisputed that Lack's was short staffed on August 24 because it had fewer than the required number of LGOs on duty, the lifeguard at L-21 was on his lunch break, and Lack's expected the lifeguards in the neighboring stands approximately a block away to cover that section. Additionally, we find the jury could infer from the letters between Lack's and USLA that Lack's knew dual-role lifeguarding was dangerous and a violation of the national standard of care. Accordingly, we affirm the denial of the JNOV motion as to this ground.

Based on the foregoing, we affirm the trial court's denial of Lack's directed verdict and JNOV motions. *See RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171 ("A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998))); *id.* ("An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below.").

NEW TRIAL ABSOLUTE

"The grant or denial of new trial motions rests within the discretion of the [trial] court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence, or the conclusions reached are controlled by error of law." ***463** *Swicegood v. Lott*, 379 S.C. 346, 355-56, 665 S.E.2d 211, 216 (Ct. App. 2008). "This [c]ourt has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Vinson*, 324 S.C. at 406, 477 S.E.2d at 723-24. "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.* at 405, 477 S.E.2d at 723.

1. Admission of Evidence

Lack's argues this court should grant a new trial based on the erroneous admission of unfairly prejudicial evidence—the 2018 sales data, the workers' compensation testimony, and the evidence regarding USLA certification. Lack's asserts that it was entitled to a new trial due to "error in the admission of irrelevant, non-probative and grossly prejudicial evidence that can only be remedied by the granting of a [n]ew [t]rial [a]bsolute."

"Only relevant evidence is admissible." *State v. Hamilton*, 344 S.C. 344, 354, 543 S.E.2d 586, 591 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." *Id.* "Although

relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." Rule 403, SCRE. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice ...." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence ...." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008).

"The admission of evidence is within the sound discretion of the trial [court], and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." *Vaught*, 366 S.C. at 480, 623 S.E.2d at 375. "An abuse of discretion occurs when the ruling ***464** is based on an error of law or a factual conclusion without evidentiary support." *Id.* However, "[a] trial [court]'s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." *Hamilton*, 344 S.C. at 358, 543 S.E.2d at 593-94.

i. 2018 Sales Receipts

Lack's argues the trial court's admission of its gross sales data for all of 2018 was reversible error entitling it to a new trial. Lack's argues the sales data evidence ****299** was not limited in scope and was not relevant to whether the lifeguards involved were "engaged in a commercial transaction at the time" of the incident. It argues that only evidence of net worth is appropriate even in the damages phase of trial. Lack's contends it was prejudiced because of the "false impression" the evidence created about Lack's finances.

Although we agree that the admission of the evidence was arguably error due its broad scope, we find Lack's was not prejudiced by its admission because there was compelling evidence of Lack's negligence and recklessness, regardless of the sales receipts. As to Lack's contention that the evidence created a "false impression" about its finances, we are not convinced the damages award was influenced by this evidence such that the jury would not have otherwise awarded this amount. We note that although the sales data was likely irrelevant except for perhaps the week of the incident, the totals for the day of the drowning show that the lifeguards engaged in sales while on duty, which lends credibility to the bystander testimony from Chandler. More importantly in this court's estimation, Abel presented compelling evidence that Lack's knew its practices were negligent but continued them for many years; we find this evidence, more than the sales data, influenced the jury's award.

For example, Dr. Griffiths testified to numerous breaches of the standard of care, including: (1) requiring lifeguards to sell merchandise and clean the beach in addition to their lifeguarding duties, (2) providing sub-standard training that did not ***465** comply with the Franchise Agreement or USLA standards, (3) failing to warn beachgoers of known hazardous conditions or to close the affected sections of the beach, (4) failing to recognize Wolde as a distressed swimmer, and (5) understaffing the beach on the day of the drowning. Further, Lack's acknowledged that the lifeguards involved in this incident missed several hours of training and that Lack's did not have any records showing the lifeguards had completed *any* aspect of their training, as required by the Franchise Agreement. Additionally, it was undisputed that the lifeguard assigned to the L-21 stand, closest to where Wolde became distressed, was on his lunch break. The stand was unmanned, there were no flags displayed at the stand, and the beach in front of it was not closed. The L-22 lifeguard, one of the lifeguards who was supposed to be covering that section of beach from approximately one city block away, was seen talking to people near the "umbrella line" with his back to the water for several minutes shortly before the incident. Wubit testified her father struggled in the water for ten to fifteen minutes and during that time no lifeguard came to assist the family; yet, bystanders on the shore were able to hear the family's cries for help, locate them in the water, and render aid. Thus, we find there was significant evidence of Lack's negligent and reckless conduct that contributed to the drowning.

Abel also presented evidence that Wolde was only forty-one years old at the time of his death, and his survivors included a fiancée and four young children. Wolde stayed at home with the children and was their primary caregiver, while Abel worked full-time. Moreover, Wubit offered heartbreaking testimony about what she witnessed and experienced, including holding onto Wolde and floating on him like a life preserver as he repeatedly went under the water and resurfaced gasping for breath.

Further, we note that Lack's presented evidence of its net worth—or lack thereof—during the damages phase. Therefore, we find the record contains other compelling evidence such that we find it was unlikely the 2018 sales data evidence influenced the jury's verdict as to either liability or damages. Thus, we hold that the admission of this evidence does not entitle Lack's to a new trial because even if it was error to admit the evidence, Lack's was not prejudiced. *See* ***466** *Vaught*, 366 S.C. at 480, 623 S.E.2d at 375 ("To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling *and* the resulting prejudice ...." (emphasis added)); *Fields*, 376 S.C. at 557, 658 S.E.2d at 86 ("Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence ....").

****300 ii. Workers' Compensation Order and Testimony**

Lack's asserts the trial court erred in admitting testimony and documentation involving a workers' compensation proceeding regarding whether Lack's employees should be classified as lifeguards for purposes of workers' compensation premiums and that the admission of such evidence warrants a new trial. It argues this was improper impeachment evidence because the issue in the 2002 proceeding was how often Lack's employees engaged in high-risk lifeguarding activities like going into the ocean to rescue someone, not what their job responsibilities were. Thus, Lack's asserts the evidence "only served to mislead and confuse the jury." We disagree.

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice ...." *Vaught*, 366 S.C. at 480, 623 S.E.2d at 375. We find this evidence was relevant to Abel's overarching theme of the case—Lack's focus on dual-role lifeguarding and how that focus influenced the actions of its employees. *See Hamilton*, 344 S.C. at 354, 543 S.E.2d at 591 ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). Further, we find this evidence was not unfairly prejudicial and did not mislead the jury. *See Fields*, 376 S.C. at 557, 658 S.E.2d at 86 ("Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence ...."). There was a plethora of testimony regarding the dual-role issue and the competing responsibilities of the lifeguards. *See State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) ("[T]he materiality and prejudicial character of the error must be determined from its relationship to the entire case."). Although Lack's asserted at trial that its employees had "a responsibility to perform lifeguard duties 100% of the time," the documentation from the workers' compensation proceeding revealed Lack's took a ***467** contrary position in that case and asserted its employees "perform their beach chair concession duties 99.995% of the time and that the lifeguard duties only have the potential to be performed 0.0047% of the time." Further, Lack's owner was cross-examined regarding these statements and had the opportunity to thoroughly flesh out Lack's contention that its position in 2002 was not inconsistent with its position at trial. *See, e.g.*, *State v. Joseph*, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997) (explaining discrepancies in testimony reflect upon the credibility of contested evidence, not its admissibility). Accordingly, the trial court did not err in admitting this evidence, and we affirm its denial of a new trial on this issue.

iii. Communications with USLA

Lack's next argues the trial court erred in failing to grant a new trial because it improperly admitted evidence and testimony regarding Lack's history with USLA, including correspondence from 1996 and 2007. It asserts Abel's presentation of the evidence "conflated USLA certification with training in accordance with USLA standards." It also argues Abel did not produce any evidence that USLA certification was the applicable standard of care and certification was not required by the Franchise Agreement. We disagree.

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice ...." *Vaught*, 366 S.C. at 480, 623 S.E.2d at 375. We find this evidence was relevant to whether Lack's was on notice that its dual-role lifeguarding violated an accepted standard of care in the industry and whether its training complied with the requirements of the Franchise Agreement, which stated lifeguards must "[s]uccessfully complete a course consisting of not less than 40 hours in open water life saving, *which [met] the criteria of the [USLA]*." *See Hamilton*, 344 S.C. at 354, 543 S.E.2d at 591 ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). Indeed, we find this evidence was highly relevant to one of the central issues in the case—Lack's knowledge

of the dangers of dual-role lifeguarding. *See* ****301** *State v. Gray*, 408 S.C. 601,610, 759 S.E.2d 160, 165 (Ct. App. 2014) ("[A] court analyzing probative value considers the ***468** importance of the evidence and the significance of the issues to which the evidence relates."); *id.* ("The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case."); *State v. Bratschi*, 413 S.C. 97, 115, 775 S.E.2d 39, 48 (Ct. App. 2015) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998))); *State v. Hawes*, 423 S.C. 118, 129, 813 S.E.2d 513, 519 (Ct. App. 2018) ("Unfair prejudice means an undue tendency to suggest a decision on an improper basis." (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008))). We hold the trial court did not err in admitting this evidence, nor was the evidence unfairly prejudicial to Lack's, and we affirm the trial court's denial of a new trial on this issue. *See Hamilton*, 344 S.C. at 357, 543 S.E.2d at 593 ("A trial [court]'s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' " (quoting *United States v. Green*, 887 F.2d 25, 27 (1st Cir. 1989))).

2. Punitive Damages

Lack's argues the trial court erred in refusing to grant a new trial absolute as a result of the jury's $7-million-dollar punitive damages award because Abel "did not identify any willful, wanton, or reckless action by Lack's." It further asserts that because Lack's presented evidence that it had a negative net worth, the punitive damages award amounts to "economic bankruptcy" and demonstrates the jury had an improper motive.[6] We disagree.

***469** "The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion." *Dillon v. Frazer*, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009). "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, or some other improper motive." *Id.* at 64, 678 S.E.2d at 253. "The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Welch v. Epstein*, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000). "In other words, to warrant a new trial absolute, the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000) (quoting Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)).

"The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). Further, "the '*economic bankruptcy*' factor is *not* an absolute bar to the imposition of punitive damages in South Carolina." *Id.* at 309, 536 S.E.2d at 424.

****302** As discussed throughout this opinion, we find there was plentiful evidence that Lack's repeatedly and knowingly breached the standard of care for professional lifeguards in multiple ways; thus, we find there was sufficient evidence to submit the issue of punitive damages to the jury. Other than unsupported assertions that the size of the award alone indicates an impropriety, Lack's points to no evidence of any ***470** improper motive or prejudice by the jury. Thus, we affirm the trial court as to this issue.

3. Survival Award

Lack's next contends the trial court should have granted its motion for a new trial because of insufficient evidence of conscious pain and suffering and because the $3.73 million survival award was so excessive that it "demonstrated the jury's motivations of passion and prejudice." It cites to five cases from around the country between 1978-2021, none of which awarded an amount (adjusted for inflation) higher than $135,000, and one of which awarded $0.[7] This list is, of course, not exhaustive and not persuasive. A more recent South Carolina case held that a new trial absolute was not warranted in a medical negligence action in which the jury awarded $1.2 million in actual damages. *See Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 637-38, 891 S.E.2d 682, 699-700 (Ct. App. 2023), *cert. denied*, S.C. Sup. Ct. order filed May 1, 2024. In that case, the hospital argued "little testimony was given regarding any pain and suffering" and "the size of the verdict alone [was] sufficient to show that the jury must have been moved by passion or prejudice. *Id.* at 637, 891 S.E.2d at 699. Our court rejected those contentions, noting

that "appellate courts give great deference to the trial court because the trial court 'possesses a better-informed view of the damages than' [the] appellate court." *Id.* at 638, 891 S.E.2d at 700 (quoting *Vinson*, 324 S.C. at 405-06, 477 S.E.2d at 723)). Accordingly, we affirm.[8] *See* ***471** *Scott v. Porter*, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000) ("Appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, and mental distress of the deceased."); *Mims v. Florence Cnty. Ambulance Serv. Comm'n*, 296 S.C. 4, 7, 370 S.E.2d 96, 99 (Ct. App. 1988) ("The amount of damages a jury may award for physical pain and suffering and for mental pain and suffering is incapable of exact measurement and is therefore left for determination by the jury.").

POST-JUDGMENT REVIEW OF PUNITIVE DAMAGES

Lack's asserts the trial court erred in upholding the jury's award of punitive damages. We disagree.

"While states possess discretion over the imposition of punitive damages, it is well established that there are procedural ****303** and substantive constitutional limitations on these awards." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.* at 417, 123 S.Ct. 1513. In determining the constitutionality of an award of punitive damages, appellate courts must consider: "(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009) (citing ***472** *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426, 123 S.Ct. 1513.

"[O]ur appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award." *Mitchell*, 385 S.C. at 583, 686 S.E.2d at 183. However, this does not mean this court "conduct[s] a de novo review of the jury's determination of the proper amount to award as punitive damages." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 915 (Ct. App. 2011). Thus, "[i]f we find the jury's award unconstitutionally excessive," we may not substitute our own judgment and "set the amount we believe to appropriate." *Id.* at 405, 714 S.E.2d at 915. Instead, "we may reduce it only to the upper limit of what would be acceptable under due process." *Id.*

1. Reprehensibility

Lack's argues its conduct was not reprehensible and that four of the five factors that courts must examine in determining reprehensibility weigh in its favor.

Courts reviewing a punitive damages award should first "consider the degree of reprehensibility of the defendant's conduct." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. "Reprehensibility is '[p]erhaps the most important indicium of the reasonableness of a punitive damages award.' " *Id.* (quoting *Gore*, 517 U.S. at 565, 116 S.Ct. 1589). In analyzing the reprehensibility factor,

> a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 587, 686 S.E.2d at 185.

We find that these factors indicate a moderate degree of reprehensibility. First, it is undisputed that the ***473** harm in this case was physical—indeed, it resulted in the complete loss of Wolde's life. Second, as discussed above, there is evidence to support a finding that Lack's acted with indifference or recklessness in disregarding the safety of others through its inadequate training, the use of dual-role lifeguards, and its understaffing on the day of the incident. Moreover, we find the conduct at issue here involved repeated actions by Lack's. Testimony indicated Lack's practiced dual-

role lifeguarding for many years and routinely understaffed the beach, particularly during lunch hours when lifeguards in neighboring stands were expected to cover additional area for those on their lunch break. *See Gore*, 517 U.S. at 577, 116 S.Ct. 1589 ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance."); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 462 n.28, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (noting that courts should look to "the existence and frequency of similar past conduct" in determining whether an award was excessive (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991))). We therefore affirm the ****304** trial court's finding that the reprehensibility factor was satisfied. [9]

2. Ratio of Punitive Damages to Actual Damages

Lack's acknowledges that the ratio factor is less than 1:1 in this case, but it argues this factor alone "cannot be used to justify excessive punitive damages when the actual damages ***474** award is excessive." We find this factor supports the constitutionality of the punitive damages award.

The second factor courts should consider in reviewing a punitive damages award is "the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award." *Mitchell*, 385 S.C. at 587-88, 686 S.E.2d at 185. "The ratio of actual or potential harm to the punitive damages award is 'perhaps the most commonly cited indicium of an unreasonable or excessive punitive damages award.' " *Id.* at 588, 686 S.E.2d at 185 (quoting *Gore*, 517 U.S. at 580, 116 S.Ct. 1589). "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513.

Here, the jury awarded approximately $13 million in compensatory damages and $7 million in punitive damages; thus, the punitive damages award is just over half of the compensatory award, well within *Campbell*'s "single-digit ratio." *See id.*

Overall, we hold the *Mitchell* and *Gore* factors weigh in favor of the constitutionality of the punitive damages award, and we affirm the trial court as to this issue. [10] , [11]

***475 CONCLUSION**

Based on all of the foregoing, the judgment of the trial court is **AFFIRMED.**

WILLIAMS, C.J., and GEATHERS, J., concur.

All Citations

446 S.C. 434, 920 S.E.2d 283

Footnotes

1 The lifeguard stands were placed approximately every block along the beach.

2 Lack's asserted the lifeguard was "explaining the meaning of different [colors] of the flags" to someone who inquired, not engaging in rental sales.

3 Lack's objected to the admission of letters from USLA dated January 21, 1996; January, 27, 1996; September 11, 2007; October 24, 2007; and March 26, 2008.

4 Chandler testified that just before he heard a commotion in the water, he walked down to the water and then, on his way back to his family's spot, he noticed "the lifeguard was in the same position that we saw when we first came out. He was sitting on the back end of the lifeguard stand chatting with a few individuals with his back to the water." When asked if the people the lifeguard was speaking to were "within ... the umbrella line," Chandler replied that "they were near them."

5 "Pre-impact fear" is the mental trauma a person experiences because of his knowledge of his impending death. *See Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 84, 700 S.E.2d 451, 454 (Ct. App. 2010), *aff'd as modified by*, 400 S.C. 209, 734 S.E.2d 142 (2012).

6 Lack's also argues it is entitled to a new trial because the trial court erred by permitting the issue of recklessness to be tried during the liability phase of the trial, and its requested instructions on bifurcation were rejected. However, Lack's acknowledges it "agreed to a verdict form containing a finding of whether Lack's had been 'reckless' in the first phase." It nonetheless contends the trial court should have instructed the jury of the consequence of such a finding—i.e., that a second phase of the trial would follow. We hold this issue is not preserved for this court's review because Lack's consented to the jury determining recklessness during the first phase of the trial. Further, Lack's cites no support for its contention that the jury was required to be instructed that a finding of recklessness would result in a second phase of trial to assess whether Abel was entitled to punitive damages. *See Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 139, 796 S.E.2d 165, 172-73 (Ct. App. 2016) ("When an appellant provides no legal authority regarding a particular argument, the argument is abandoned and the court can decline to address the merits of the issue.").

7 As to Lack's arguments regarding the evidence of conscious pain and suffering, we have thoroughly addressed that issue, *supra*, and for the same reasons, we affirm the trial court on this ground.

8 Lack's raised several other issues that are not preserved for our review. First, Lack's argues the trial court improperly denied its motion for a new trial because of the jury's alleged confusion over the applicability of the mortality tables to the survival award. Lack's asserts that the trial court "mischaracterized" its position in its order on the post-trial motions, which found Lack's failed to timely object. However, Lack's did not file a Rule 59(e) motion as to that order, and therefore, its argument is not preserved for our review as it never obtained a ruling on the merits. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review."); *Nelums v. Cousins*, 304 S.C. 306, 307, 403 S.E.2d 681, 681-82 (Ct. App. 1991) (explaining an issue was not preserved for appellate review because "the trial court was never afforded the opportunity to rule on the clarity of its order" when the appellant failed to file a Rule 59(e) motion). Next, Lack's argues the trial court erred in failing to grant a new trial on the wrongful death claim because the award was excessive and the "return of a verdict even higher than what [Abel]'s counsel suggested" demonstrated the improper motives of the jury. We hold this issue was abandoned as Lack's does not cite any authority, or even to the record, to support its argument. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (holding that "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review").

9 Lack's also argues the trial court should have considered the remaining factors articulated in *Gamble v. Stevenson*. *See* 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991) ("[T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) ... 'other factors' deemed appropriate."). However, the *Mitchell* court expressly held "that *Gamble* remains relevant to the post-judgment due process analysis ... only insofar as it adds substance to the *Gore* guideposts." 385 S.C. at 587, 686 S.E.2d at 185. We find the analysis set forth in *Mitchell* and *Gore* is sufficient in this instance.

10 The parties appear to agree that there are no directly comparable civil penalties or cases. Thus, this factor is neutral regarding the constitutionality of the punitive damages award. *See Mitchell*, 385 S.C. at 588, 686

S.E.2d at 186 ("Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.").

11 Lack's also argues the trial court failed to consider all of the factors required by section 15-32-520(E) of the South Carolina Code (Supp. 2024). We note that Lack's filed a Rule 59(e) motion regarding the trial court's November 28, 2022 Order on Post-Trial Review of Punitive Damages Award and raised this issue; however, there is no order ruling on that motion in the record and it is unclear whether one was ever issued or if the motion remains pending in the trial court. Accordingly, we decline to address this issue. *See Matter of Est. of Moore*, 435 S.C. 706, 715-16, 869 S.E.2d 868, 872-73 (Ct. App. 2022) (noting the appellant "bears the burden of providing a sufficient record on appeal from which this court can make an intelligent review" and declining to address an issue for which the appellant failed to include relevant documents in the record).

2025 WL 2158927
Only the Westlaw citation is currently available.

Court of Appeals of South Carolina.

Steven M. BRANT, Employee, Claimant,

v.

CORE SERVICES, LLC and South Carolina Department of Transportation, Employer, Berkshire Hathaway Direct Insurance Company, Carrier, Markel Insurance Company and South Carolina State Accident Fund, Carriers, and South Carolina Workers' Compensation Uninsured Employers' Fund, Defendants, of which Berkshire Hathaway Direct Insurance Company is the Appellant,

and

South Carolina Department of Transportation, South Carolina State Accident Fund, and South Carolina Workers' Compensation Uninsured Employers' Fund are the Respondents.

Appellate Case No. 2022-000154
|
Unpublished Opinion No. 2025-UP-264
|
Submitted April 1, 2025
|
Filed July 30, 2025

Appeal From The Workers' Compensation Commission

Attorneys and Law Firms

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Timothy Blair Killen, of Holder, Padgett, Littlejohn & Prickett, LLC, of Mount Pleasant, for Respondents South Carolina Department of Transportation and South Carolina State Accident Fund.

Opinion

PER CURIAM:

***1** In this workers' compensation matter, Berkshire Hathaway Direct Insurance Company (biBERK) appeals an order from the Appellate Panel of the Workers' Compensation Commission (the Commission) finding biBERK failed to effectively cancel the workers' compensation insurance policy it issued to Core Services, LLC (Core) and imposing liability upon biBERK for Steven M. Brant's (Claimant) compensable injuries. We affirm.

"The South Carolina Administrative Procedures Act governs judicial review of decisions by the Workers' Compensation Commission." *Clemmons v. Lowe's Home Ctrs., Inc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017); *see* S.C. Code Ann. § 1-23-380 (Supp. 2024). "An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law." *Clemmons*, 420 S.C. at 287, 803 S.E.2d at 270.

STANDING

biBERK argues the Commission erred in allowing the South Carolina State Accident Fund (SAF) and the South Carolina Workers' Compensation Uninsured Employers' Fund (UEF) to contest biBERK's cancellation of Core's insurance policy because they lacked standing. biBERK asserts SAF and UEF were not parties to the insurance contract and, therefore, have no power to enforce it. We disagree.

"A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.' " *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (quoting *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id.* (alteration in original) (quoting *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327).

Here, SAF and UEF are named defendants in Claimant's action. Although they were not parties to the underlying insurance contract, they undeniably have a real, material interest in the outcome of Claimant's workers' compensation action. In his Form 50, Claimant sought determinations as to both the compensability of his injuries and the identity of the responsible financial party. Thus, the Commission's holding could have directly impacted either defendant.

As the carrier for Claimant's statutory employer, the South Carolina Department of Transportation (SCDOT), SAF's interest in the outcome of Claimant's action is not peripheral to the subject matter of the court. *Cf. id.* at 138–39, 644 S.E.2d at 702–03 (holding an insurance carrier's interest in a family court matter did not warrant intervention because its interest was "merely 'peripheral and not the real interest at stake' " (quoting *Bailey*, 312 S.C. at 454, 441 S.E.2d at 325)). The same can be said for UEF had the Commission determined Core's coverage had lapsed at the time of Claimant's injuries. Thus, we hold the Commission properly allowed SAF and UEF to challenge the validity of biBERK's cancellation of Core's policy.

CANCELLATION OF THE POLICY

***2** Alternatively, biBERK contends that if SAF and UEF had standing, then the Commission erred in finding biBERK's cancellation of Core's policy invalid.

As a preliminary matter, biBERK contends Core stipulated that it did not have coverage at the time of Claimant's injuries. biBERK points to a compliance agreement Core entered into with the Commission in August 2019. In *Bowman v. State Roofing Co.*, our supreme court held that a similar capitulation agreement did not prevent the employer from challenging the validity of the carrier's cancellation of the workers' compensation insurance policy. 365 S.C. 112, 116–17, 616 S.E.2d 699, 701–02 (2005). Rather, the agreement served as an admission by the employer that it could not demonstrate compliance with workers' compensation insurance requirements after the Commission received notice that the employers' coverage had been cancelled. *Id.* at 116, 616 S.E.2d at 701. While the employer agreed to pay a fine for non-compliance, the agreement did not contemplate the validity of the cancellation, and the employer insisted it remained covered. *Id.* Further, the agreement itself stated the employer did not "make any admissions or waive any claims or causes of action" against any third party or insurance company. *Id.* at 802, 616 S.E.2d at 701. We find the "compliance agreement" Core signed for the Commission serves a similar purpose. Like the agreement in *Bowman*, Core's compliance agreement also contained a clause stating it did not waive any claims it may have against an insurance company. Thus, we agree with the Commission that Core did not concede any claims it had against biBERK.

biBERK also asserts the Commission erred in applying South Carolina law when considering the validity of the policy cancellation. [1] We disagree. Section 38-61-10 of the South Carolina Code (2015) provides, "[A]ll contracts of insurance the applications for which are taken within the State are considered to have been made within the State and are subject to the laws of this State." "[U]nder this statute it is immaterial where the contract was entered into. Further there is no requirement that the policyholders or insurers be citizens of South Carolina." *Sangamo Weston, Inc. v. Nat'l Sur. Corp.*, 307 S.C. 143, 149, 414 S.E.2d 127, 130 (1992). "South Carolina has a substantial interest in who bears the ultimate liability for operations conducted in this state which result in injury to South Carolina property and citizens." *Id.* at 149, 414 S.E.2d at 131. Thus, although neither Core nor biBERK are located in South Carolina, the application of South Carolina law is, nevertheless, proper because "both parties availed themselves of the law of South Carolina when they respectively provided or received insurance on interests located in this state." *Id.*

On April 2, 2019, biBERK sent a Notice Of Cancellation (NOC) for Core's policy to Core and NCCI, alleging Core made a material misrepresentation in its application for workers' compensation insurance. The NOC advised that the policy would be canceled effective April 21.

***3** Subsection 38-75-730(e) of the South Carolina Code (Supp. 2024) governs whether biBERK validly cancelled Core's policy prior to Claimant's date of injury. It states, "Cancellation of a workers' compensation insurance policy under this section is *not effective* unless *written notice of cancellation is delivered or mailed* to the South Carolina Workers' Compensation Commission, *and to the insured*, not less than the time frame required for notice to the insured under this section." *Id.* (emphases added). Thus, the plain language of the statute requires that biBERK provide at least thirty days written notice of cancellation to Core. *See* S.C. Code Ann. § 38-75-730(c) (Supp. 2024) (providing that a workers' compensation insurance policy that has been in effect for less than 120 days and that is not a renewal of a prior existing policy can be "canceled for any reason by furnishing *to the insured at least thirty days' written*

notice of cancellation" (emphasis added)). Additionally, these statutory provisions must be read in conjunction with the policy and any applicable regulations. *See Crews v. W.R. Crews, Inc.*, 390 S.C. 15, 26, 699 S.E.2d 189, 195 (Ct. App. 2010) (noting that section 38-75-730(c) must be read in conjunction with any applicable regulations concerning when and how an insurance carrier may cancel a policy). South Carolina Regulation 67-405(C) addresses a carrier's NOC to the Commission: it requires notice to the Commission's authorized agent. *See* S.C. Code Ann. Regs. 67-405(C) (2012) (providing that if "the insurer cancels the policy, the employer's insurer shall immediately notify the Commission's authorized agent that it no longer insures the employer.... [a] worker's compensation insurance carrier shall file a notice of termination [that will] not be effective until thirty days after receipt by the Commission's authorized agent"). The cancellation provisions within the policy require biBERK to provide at least ten days written notice to the employer "at [the] mailing address shown in Item 1 of the Information Page." The cancellation provisions further state, "Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with the law." Therefore, reading the policy language and the applicable statutes and regulations together, biBERK was required to provide at least thirty days written notice to Core and the Commission's authorized agent, the National Council on Compensation Insurance (NCCI), to cancel the policy. Further, for the cancelation to be valid, the policy required the notice to be mailed or delivered to the insured's address specified in Item 1 of the policy information page.

Based on the foregoing, the cancellation could not have been effective until May 2. Claimant's injuries occurred on May 6. Under Item 1 of the policy information page, Core listed its address as 828 East High Street, PMB 272, Lexington, Kentucky 40502. This address was listed on the NOC itself; however, the proof of mailing for the NOC failed to include the PMB—listing only 828 East High Street as the address in Lexington. According to NCCI records, it received biBERK's NOC for Core on April 2, but nothing in the record indicates if or when Core received the NOC. All of biBERK's documents marked for internal use include the full address. In a deposition submitted to the Commission, Margaret Yoh, an underwriting specialist for biBERK, admitted the proof of mailing omitted the personal mailbox number for Core's address and that their records contained no proof that Core received the NOC. Core has neither appeared nor taken a position in this action.

In its order, the Commission stated:

> In this case, biBERK's proof of mailing does not show the entire, complete, or proper address as set forth in the policy. We do not find this deficiency to be a mere "scrivener's error" or "inconsequential," as stated in biBERK's legal memorandum. The legistature specifically allows Carriers to prove cancellation by and through a proof of mailing: a proof of mailing showing the cancellation was sent somewhere other than required by law is most certainly not "inconsequential."

The Commission, therefore, found biBERK's cancellation of Core's policy invalid for failing to fully comply with South Carolina law and the terms of the policy.

Based on the foregoing, we hold there is evidence in the record to support the Commission's finding that biBERK failed to effectively provide notice to Core of its policy cancellation. *See Barton v. Higgs*, 381 S.C. 367, 369–70, 674 S.E.2d 145, 146 (2009) ("When reviewing an appeal from the workers' compensation commission, the appellate court *may not weigh* the evidence or substitute its judgment for that of the full commission as to the weight of evidence on questions of fact." (emphasis added)).

CONCLUSION

Accordingly, the Commission's order is

AFFIRMED. [2]

WILLIAMS, C.J., and GEATHERS and TURNER, JJ., concur.

All Citations

Not Reported in S.E. Rptr., 2025 WL 2158927

Footnotes

1 biBERK concedes that the Commission has jurisdiction over the matter as South Carolina is a 3c endorsed state on the insurance policy.

2 We decide this case without oral argument pursuant to Rule 215, SCACR.

446 S.C. 105
Court of Appeals of South Carolina.

Zachary BROWN, Claimant, Respondent,
v.
SOUTHEASTERN SERVICES, H.H.I., LLC, Employer, and Uninsured Employers' Fund, Carrier, Defendants, of which Uninsured Employers' Fund is the Appellant.

Appellate Case No. 2022-001153
|
Opinion No. 6111
|
Heard March 12, 2025
|
Filed May 21, 2025
|
Rehearing Denied June 27, 2025
|
Certiorari Denied November 18, 2025

Synopsis

Background: Uninsured Employers' Fund appealed from an order of the appellate panel of the Workers' Compensation Commission, which affirmed an order of a single commissioner finding that employer of workers' compensation claimant, who injured his leg while working as a laborer for employer, was subject to the Workers' Compensation Act, awarding claimant approximately $3,100 for a closed period of temporary disability benefits, ordering employer to provide medical treatment as recommended by a treating physician of employer's choosing, and ordering Fund to pay for claimant's emergency room treatment.

Holdings: The Court of Appeals, Hewitt, J., held that:

Commission's order was not an immediately appealable final decision under the Administrative Procedures Act (APA), and

APA's exception to final-judgment rule did not apply to make order immediately appealable.

Dismissed.

Procedural Posture(s): Review of Administrative Decision.

Appeal From The Workers' Compensation Commission

Attorneys and Law Firms

Timothy Blair Killen, of Holder, Padgett, Littlejohn & Prickett, LLC, of Mt. Pleasant, for Appellant.

Joshua Reece Fester, of Hardeeville, for Respondent.

Opinion

HEWITT, J.:

****927 *109** This appeal concerns an award of temporary disability payments and medical benefits in a workers' compensation case. The parties to this appeal are the Uninsured Employers' Fund (the Fund) and Zachary Brown (Claimant).

The key dispute before the Workers' Compensation Commission was whether Claimant's employer, Southeastern Services, H.H.I., LLC (Southeastern), regularly employed four or more employees and was subject to the Workers' Compensation Act (the Act). The Fund argues the commission erred in finding Southeastern had the requisite number of employees. Claimant defends the commission's decision.

At our request, Claimant and the Fund submitted supplemental briefs addressing whether the commission's decision is immediately appealable. As both sides acknowledge, the right to immediately appeal a workers' compensation case is controlled by the Administrative Procedures Act (the APA), which provides that only two types of orders are immediately appealable: final decisions and intermediate orders for which delayed review will not provide an adequate remedy. The order in this case is neither a final decision nor is it the type of interlocutory order that must be immediately reviewed for appellate review to be adequate. Therefore, we dismiss this case as not immediately appealable.

BACKGROUND

The circumstances giving rise to Claimant's injury are fairly straightforward. Claimant was employed as a laborer for Southeastern. It is undisputed that Claimant fell from a ladder and injured his left leg while removing stucco from around a window at a home on Hilton Head. Claimant was taken to Hilton Head Hospital by two coworkers. He was admitted to

the emergency room and treated for a mild fracture of the left tibia and fibula. Claimant underwent surgery later that month. Hardware was installed in his left leg during the surgery.

Roughly a year and a half later, Claimant sought an independent medical evaluation with Dr. Joseph Tobin. Dr. Tobin opined to a reasonable degree of medical certainty that Claimant had not yet reached maximum medical improvement. He further opined that Claimant would benefit from future treatment including the removal of the hardware from his leg.

***110** Adversarial proceedings began when Claimant filed a Form 50 requesting a hearing before the commission. Southeastern conceded that it did not have workers' compensation insurance but contended it was not subject to the Act. There was no dispute about Claimant's injury; instead, the pivotal question was whether Southeastern was subject to the Act at the time of the injury.

The single commissioner found Southeastern was subject to the Act, awarded Claimant roughly $3,100 for a closed period of temporary disability benefits, and ordered Southeastern to provide medical treatment as recommended by a treating physician of Southeastern's choosing. The single commissioner also ordered the Fund to pay for Claimant's emergency room treatment. The Fund appealed this order to the commission's appellate panel. The appellate panel affirmed the single commissioner's order in a 2 to 1 majority decision. This appeal followed.

APPEALABILITY

The APA governs the court system's review of workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The right to seek judicial review of an agency's decision is found in ****928** section 1-23-380 of the South Carolina Code (Supp. 2024). In explaining two types of orders are immediately "appealable" to the court system, the statute provides, in pertinent part:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review .... A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Id.

Although the first part of the statute uses the term "final decision," most precedents use the term "final judgment." "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." ***111** *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010); *see also Good v. Hartford Accident & Indemn. Co.*, 201 S.C. 32, 41–42, 21 S.E.2d 209, 212 (1942) (noting that a final judgment must "[d]ispose of the cause ... as to all the parties, reserving no further questions or directions for future determination ... and must be final in all matters" (quoting 2 Am. Jur. 860 § 22)). One of this court's past cases explains "[a]n order of the commission is not a final decision unless it resolves the entire action." *Ex parte S.C. Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. 501, 504, 768 S.E.2d 670, 672 (Ct. App. 2015). Another describes the APA as limiting appeals "to those from a 'final decision' of the commission." *Rose v. JJS Trucking*, 411 S.C. 366, 368, 768 S.E.2d 412, 413 (Ct. App. 2015). Black's Law Dictionary defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy." *Judgment*, *Black's Law Dictionary* (12th ed. 2024). We understand these authorities to say that an agency determination is not a "final decision" unless it marks the end of the road for the case. *See Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894 (holding that an administrative order is interlocutory "[i]f there is some further act [that] must be done by the court prior to a determination of the rights of the parties").

As the parties concede, the order in this case is not a "final decision." The commission's order did two things: it addressed whether Southeastern had the number of employees required to fall under the commission's jurisdiction and it established Claimant's entitlement to certain temporary benefits. Claimant has not reached maximum medical improvement, and the commission has not ruled on whether Claimant is entitled to an award for any permanent disability. Other disputes may well arise as this case proceeds toward a final decision. *See Rose*, 411 S.C. at 368, 768 S.E.2d at 413 (finding an order from the

workers' compensation commission, which left permanency unresolved, did not qualify as a final order because "the commission ha[d] not yet ruled on the merits of [Claimant's] entire claim for benefits"). It is not uncommon for there to be several hearings and orders as a workers' compensation case makes its way to a final judgment.

The Fund contends the order in this case is immediately appealable as an intermediate ruling that cannot be ***112** adequately reviewed later. This order certainly fits the definition of an intermediate or interlocutory order, which is "[a]n order that relates to some intermediate matter in the case; any order other than a final order." *Judgment*, *Black's Law Dictionary* (12th ed. 2024). But precedent explains the APA's exception to the final judgment rule is a narrow exception that is to be rarely applied. *See Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016) ("[C]ircumstances ... that will permit the immediate appeal of an interlocutory administrative decision under section 1-23-380(A) 'are about as rare as the proverbial hens' teeth." (quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)); *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 283, 290, 826 S.E.2d 863, 864, 867 (2019) (invoking this exception because remanding the claim to a single commissioner "for what would be a third ruling on the same claim" would create an "unreasonable delay in [reaching] a final decision").

****929** The Fund's argument for immediate review of this award is that Southeastern will not have an adequate remedy if review of this decision is delayed until the final judgment. This is so, the Funds says, because there will be no way for Southeastern to recover what the Fund will have paid for Claimant's medical treatment and any temporary disability payments. We cannot agree.

The first reason we must reject this argument is that if we construed the exception to operate this broadly, it would completely swallow the final judgment rule, at least as far as workers' compensation cases are concerned. The purpose of the final judgment rule "is to present the whole cause for determination in a single appeal and thus to prevent the unnecessary expense and delay of repeated appeals." *Good*, 201 S.C. at 41, 21 S.E.2d at 212 (citation omitted). Workers' compensation cases frequently involve awards of temporary benefits, including medical care, followed by a period of treatment before there is a final decision adjudicating whether the injury caused any permanent disability and determining the appropriate benefits to compensate for that disability. If this order is immediately appealable, every order addressing compensability and awarding temporary benefits or medical treatment would be immediately appealable. Review of intermediate orders would cease to be a rare exception. This would ***113** thwart, rather than serve, the workers' compensation regime's purpose of providing a speedy, informal, and efficient avenue to recovery. *See Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) ("The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation."); *see also Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault."). Allowing temporary awards to be immediately appealable would encourage, rather than discourage, prolonged litigation and piecemeal appeals.

Second, and to the same general point, it is helpful to contrast this case with our supreme court's explanation that this exception can apply when the commission's order creates an unreasonable delay in issuing a final order. *See Hilton*, 418 S.C. at 251–52, 791 S.E.2d at 722–23 ("Under these extraordinary circumstances, ... where the [c]ommission has in effect ordered a new trial without regard to the matters raised by the appealing party and without any explanation why such an extreme remedy is appropriate ... [demonstrates] that requiring Hilton to wait to appeal until the final agency decision would not provide an adequate remedy."); *see also Russell*, 426 S.C. at 287, 826 S.E.2d at 866 (finding that the inadequate remedy exception was satisfied when "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the [c]ommission" (quoting *Hilton*, 418 S.C. at 252, 791 S.E.2d at 723)); *id.* at 288, 826 S.E.2d at 866 ("In this case, however, the commission's unnecessary delays and repeated remands over the almost eight years since Russell filed her change of condition claim frustrated the goals of the Workers' Compensation Act."). Nothing whatsoever suggests this case was prime for an unreasonably lengthy delay. Claimant was awarded a closed period of temporary disability payments because he was released to work within a few weeks of his injury and surgery. The commission's order required nothing more than medical treatment by an authorized treating physician. One wonders whether this seemingly simple case might ***114** have already proceeded to a final judgment had there not been an interlocutory appeal.

This system of delaying most workers' compensation appeals until the final judgment is not perfect. We understand, and expressly do not discount, the fact that this regime places the interim costs of disability and medical benefits on employers. That concern has less force in this case because the Fund acknowledges it has a statutory right to recover all of its interim expenses from Southeastern. *See* S.C. Code Ann. § 42-7-200 (C)–(D) (2015). But setting the Fund's unique position aside, two things prevent us from adopting the view that costs such as those ****930** associated with temporary benefits warrant immediate appellate review. First, there already is an existing remedy. Our case law recognizes that an employer has a right to seek reimbursement if a workers' compensation award is reversed. *See Moore v. North American Van Lines*, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995) (finding the circuit court may hear an employer's restitution claim when a benefit award is reversed because the commission lacked jurisdiction over the claim). This may not be a perfect remedy, but we cannot say it is inadequate. *See also Rose*, 411 S.C. at 369, 768 S.E.2d at 413 (holding parties have an adequate remedy when the only alleged prejudice is delaying the payment of money between insurance providers). Second, adopting this argument would just be another way of turning the final judgment rule completely on its head.

Because the commission's order is neither a final decision nor is it the type of interlocutory order that has to be reviewed immediately to ensure adequate appellate review, we dismiss this case as not immediately appealable. We decline to address all other issues because this dismissal is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

DISMISSED.

THOMAS and CURTIS, JJ., concur.

All Citations

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Court of Appeals of South Carolina.

Ryan COOK, Employee, Appellant,

v.

CONDUSTRIAL, INC., Employer and Benchmark Insurance Company, Carrier, Respondents.

Appellate Case No. 2020-001236

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Unpublished Opinion No. 2025-UP-313

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Appeal From The Workers' Compensation Commission

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Opinion

MCDONALD, J.:

***1** Ryan Cook appeals an order from the Appellate Panel of the Workers' Compensation Commission reversing the single commissioner's award and denying his claim. Cook argues the Appellate Panel erred in failing to liberally construe the Workers' Compensation Act (the Act) in favor of coverage; declining to find Cook was a statutory employee; failing to find Cook's admitted accident arose out of and in the course of his employment under the premises rule; and incorrectly analyzing the "going and coming" rule. We reverse the order of the Appellate Panel, reinstate the order of the single commissioner, and remand for proceedings consistent with this opinion.

Cook was employed as an industrial painter by Condustrial, Inc., a specialized staffing company providing skilled labor to a variety of South Carolina clients. [1] Condustrial assigned Cook to work for Phillips Industrial (Phillips), which had a contract for work at the British Petroleum (BP) plant located on several hundred acres in Berkeley County. [2] The BP plant processes paraxylene, a liquid byproduct from the refining of gasoline, for plastic and textile uses.

Cook testified that at the end of each work day at the plant, he cleaned his equipment and stored it in a trailer. His supervisor, Bogar Anderson, then drove him to the security gate where Cook would sign out and return his security pass before Anderson drove them to the designated subcontractor parking lot on the property. Cook would exit this parking lot, as instructed, onto Amoco Road, turn onto Flag Creek Road, and follow Flag Creek Road before exiting the plant complex onto Cainhoy Road. [3]

On the day of his accident, Cook applied a protective coating to a newly constructed cement service ramp used by trucks delivering hydrobromic acid, a corrosive raw material used in the plant's manufacturing process. [4] Cook then followed his normal routine in finishing the day's work and leaving the property. While heading home, Cook lost control of his vehicle on Flag Creek Road and flipped over into a ditch approximately one mile from the subcontractor parking lot. EMS transported Cook to the Medical University of South Carolina (MUSC), where he underwent fusion surgery and fixation of his fifth, sixth, seventh, and eighth vertebrae. MUSC also treated fractures in Cook's left hand and pelvis.

***2** Cook filed a Form 50, alleging injuries to multiple body parts. Condustrial and Benchmark Insurance Company (collectively, Respondents) filed a Form 51 denying the accident arose out of and in the course of Cook's employment.

Following a hearing, the single commissioner found Cook's claim compensable, awarding temporary total disability benefits and additional medical treatment. Respondents filed a Form 30, requesting review. The parties next appeared before the Appellate Panel, which reversed the single commissioner and denied Cook's claim. The Appellate Panel found the "premises rule" was inapplicable because Condustrial did not own, maintain, or control the road where the accident occurred; Cook was not a statutory employee for purposes of imputing liability to Condustrial because the

work Cook performed was not part of BP's essential business functions; and no exception to the "going and coming" rule applied.

Respondents do not dispute the relevant facts of the case; thus, whether Cook's injuries are compensable involves questions of law. *See Davaut v. Univ. of S.C.*, 418 S.C. 627, 632, 795 S.E.2d 678, 681 (2016) ("Because the facts are not in dispute, we are free to decide this case as a matter of law."); *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007) ("Where there are no disputed facts, the question of whether an accident is compensable is a question of law."). The Act is to be liberally construed in favor of coverage, while restrictions and exceptions are to be strictly construed. *See Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (explaining that because "workers' compensation statutes are construed liberally in favor of coverage ... [, it] follows that any exception to workers' compensation coverage must be narrowly construed").

1. Cook argues the Appellate Panel erred in reversing the single commissioner's ruling that he was Condustrial's statutory employee for purposes of the Act. While we agree Cook was not BP's statutory employee, we find the evidence established he was Condustrial's employee. Condustrial, a labor contractor, placed Cook as an industrial painter at Phillips, which then used him pursuant to its contract with BP to provide work essential to BP's manufacturing process.

"Coverage under the Act is generally dependent on the existence of an employer-employee relationship." *Edens v. Bellini*, 359 S.C. 433, 442, 597 S.E.2d 863, 868 (Ct. App. 2004). There are exceptions to this general rule, one of which is found at section 42-1-400 of the South Carolina Code (2015), which details an owner's obligation to provide workers' compensation coverage for the workmen of his subcontractor:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if the workman had been immediately employed by him.

***3** "Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act." *Edens*, 359 S.C. at 443, 597 S.E.2d at 868.

Here, there is evidence in the record that an essential function of the BP plant is to process paraxylene, a liquid byproduct from the refining of gasoline, into powder form for multiple uses including textiles and plastics. Although BP employs resident contractors to perform general maintenance at the plant, BP uses outside contractors when the resident contractors "can't handle something." BP subcontracted Phillips, to which Condustrial had assigned Cook, to apply a protective coating onto its new cement service ramp used by trucks when unloading the hydrobromic acid used in BP's processes. Because this was a new ramp, application of this protective coating was not merely routine maintenance. Still, Phillips's application of the protective coating to the cement service ramp in the instant case is not a part of BP's core business of reprocessing paraxylene.

Even so, we find Cook's injuries on BP's private road as Cook was going home from work are compensable against—or otherwise imputed to—Condustrial. South Carolina case law supports this finding. For example, in *Kilgore Group, Inc. v. South Carolina Employment Security Commission*, 313 S.C. 65, 437 S.E.2d 48 (1993), our supreme court held substantial evidence supported the finding that temporary workers sent to The State Newspaper and State Printing Company were employees of Kilgore Group, Inc., the business supplying the temporary workers. Although the clients controlled the daily activities of the workers, Kilgore provided their workers' compensation coverage. The court agreed with the South Carolina Employment Security Commission that Kilgore's contract language declaring the relationship with the worker to be that of an independent contractor was not dispositive. *Id.* at 68-69, 437 S.E.2d at 49-50.

In reaching this decision, the supreme court noted "the only specific evidence of any actual relationship was that of the workers sent to *The State* and State Printing Company." *Id*. at 69, 437 S.E.2d at 50 (citing *Ellison, Inc. v. Bd. of Rev. of the Indus. Comm'n of Utah, Dep't of Emp. Sec.*, 749 P.2d 1280, 1285 (Utah Ct. App. 1987) (holding employer had burden of producing other employees it maintained operated under a different relationship than the employee who testified before the Industrial Commission)). The court then explained:

> The testimony of these clients indicates the workers' performance and the manner in which it was done were controlled directly by *The State* and State Printing Company supervisors. However, *The State* and State Printing Company had no contract with the workers. Their ability to exercise control over the workers' activities was derived solely from their contracts with Kilgore and Kilgore's contract with the workers. Therefore, it can be inferred Kilgore possessed the right to control the workers' performance and the manner in which it was done and delegated that authority to its clients.

Id.

More recently, in *Turner v. Medustrial Healthcare Staffing Service and Condustrial, Inc.*, Op. No. 2024-UP-110, at *2 (S.C. Ct. App. filed July 3, 2024), *cert. denied*, (Dec. 10, 2024), this court rejected Condustrial's argument that a contract nurse placed at the South Carolina Department of Corrections pursuant to SCDC's staffing agreement with Condustrial was an independent contractor rather than Condustrial's employee. As in *Kilgore*, Turner's execution of Condustrial's "Independent Contractor Agreement" was not dispositive of the nature of the employment relationship. *Id*. Nor was a finding by the Department of Employment and Workforce that such nurses were independent contractors. *Id*. Instead, applying the four-factor test of *Shatto v. McLeod Regional Medical Center*, 406 S.C. 470, 753 S.E.2d. 416 (2013), this court found Turner was Condustrial's employee. *See Turner*, at *2 ("[T]he determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the *right* to control the claimant in the performance of his work." (quoting *Shatto*, 406 S.C. at 475, 753 S.E.2d at 419)); *Shatto*, 406 S.C. at 475-76, 753 S.E.2d at 419 (explaining that in analyzing the work relationship as a whole, the appellate court examines four factors: "(1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire" (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009))); *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015) ("Whether a claimant is an employee or independent contractor is a jurisdictional question and therefore the [appellate c]ourt may take its own view of the preponderance of the evidence."); *Sellers v. Tech Serv., Inc.*, 421 S.C. 30, 37, 803 S.E.2d 731, 735 (Ct. App. 2017) ("South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." (quoting *Spivey v. D.G. Constr. Co.*, 321 S.C. 19, 21-22, 467 S.E.2d 117, 119 (Ct. App. 1996))); *Lewis*, 411 S.C. at 641, 770 S.E.2d at 395 ("The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence."); *id.* at 642, 770 S.E.2d at 395 ("Each factor is considered with equal force and the mere presence of one factor indicating an employment relationship is not dispositive of the inquiry.").

***4** In *Turner*, Condustrial had the right to direct the nurses it provided to SCDC, SCDC provided the nurses the equipment they used, and Condustrial covered the nurses' insurance. *Turner*, at *3. "Condustrial's method of paying Turner an hourly rate indicate[d] an employment relationship." *Id*. "Finally, the right to fire factor also weigh[ed] in favor of an employment relationship because many of the forms Condustrial required Turner to complete provided Condustrial had the right to fire her." *Id*.

We do not have the benefit of Cook's Condustrial contracts, but the single commissioner aptly summarized the evidence of Cook's employment:

> The Claimant was employed by Condustrial, Inc., a labor contractor company, as an industrial painter. Condustrial assigned the Claimant to work for Phillips Industrial which contracted to perform work at the British Petroleum (BP) Plant in

> Cainhoy, South Carolina. Claimant testified he worked from 7:00 AM to 5:00 PM and was paid $16.00 per hour. (Citations omitted). This is consistent with the Defendant's WCC Form 12-A which indicates the Claimant was paid six hundred forty dollars per week in wages. The Defendants produced no evidence to rebut the Claimant's testimony.

Cook testified that in his job with Condustrial, he "was hired to go to different locations and paint, sandblast, pressure wash, whatever they needed me to do at the time." Cook's supervisor on the BP job testified that when they first started the job, "we tell him everything" including "which way to come in to the plant and which way to leave." With respect to the equipment provided, Cook explained industrial painting involves "a lot more than a paintbrush." There is specific equipment for sandblasting and hydroblasting, and some of this equipment can weigh as much as seventy-five pounds. At the end of each work day, Cook cleaned and stored the equipment, was driven by his supervisor to the security gate to sign out and return his premises pass, and was then driven to the subcontractor parking lot to pick up his car. As in *Turner*, we find Cook was Condustrial's employee for purposes of his assigned work at the BP plant.

2. Cook next argues the Commission erroneously found his accident did not arise out of and in the course of his employment under the premises rule. In the alternative, Cook asserts this court should find his accident compensable under the fourth exception to the going and coming rule. We agree the Commission misapplied both the premises and going and coming rules in reversing the single commissioner's award.

Our supreme court examined the going and coming rule as well as its exceptions in *Davaut*. 418 S.C. at 633, 795 S.E.2d at 681. There, a university professor was struck by a vehicle and injured while crossing a city street to reach her car in a lot owned by the university. *Id.* at 630, 795 S.E.2d at 679-80. Relying on *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987), [5] the single commissioner found the employee's injuries were not compensable. *Davaut*, 418 S.C. at 631, 795 S.E.2d at 680. Both the commission and this court upheld the single commissioner's denial of coverage. *Id.*

***5** In reversing these decisions, our supreme court explained:

> "Workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment." *Bentley v. Spartanburg County*, 398 S.C. 418, 422, 730 S.E.2d 296, 298 (2012). " 'Arising out of' refers to the origin of the cause of the accident; 'in the course of' refers to the time, place, and circumstances under which the accident occurred." *Baggott v. S. Music, Inc.*, 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998). "An injury occurs in the course of employment 'when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto.' " *Id.* (quoting *Beam v. State Workmen's Comp. Fund*, 261 S.C. 327, 331, 200 S.E.2d 83, 85 (1973)). "In determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward providing coverage and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." *Whigham v. Jackson Dawson Commc'ns*, 410 S.C. 131, 135, 763 S.E.2d 420, 422 (2014).

418 S.C. at 633, 795 S.E.2d at 681 (other internal citations omitted).

Reiterating that "employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done[,]" the supreme court stated an injury is one arising out of and in the court of the employment if an employee is "injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises." *Id.* (quoting *Williams v. S.C. State Hosp.*, 245 S.C. 377, 381, 140 S.E.2d 601, 603 (1965); *see also Holston v. Allied Corp.*, 300 S.C. 174, 177, 386 S.E.2d 793, 795 (Ct. App. 1989) (holding employee's act of exiting employer's premises by car "was a reasonable incident to her leaving the place of her work and the injury therefore resulted from a risk reasonably incident to her employment and 'arose out of' the employment").

"[T]he general rule in South Carolina is that an injury sustained by an employee away from the employer's premises while on his way to or from work does not arise out of and

in the course of employment.' " *Davaut*, 418 S.C. at 634, 795 S.E.2d at 682 (quoting *Howell*, 291 S.C. at 471, 354 S.E.2d at 385). But we recognize multiple exceptions to this general rule:

> (1) Where, in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) Where the employee, on his way to or from his work, is still charged with some duty or task in connection with his employment; (3) The way used is inherently dangerous and is either (a) the exclusive way of ingress and egress to and from his work; or (b) constructed and maintained by the employer; or (4) That such injury incurred by a workman in the course of his travel to his place of work and not on the premises of his employer but in close proximity thereto is not compensable unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the servant in going to and coming from his work.

***6** *Sola v. Sunny Slope Farms*, 244 S.C. 6, 14, 135 S.E.2d 321, 326 (1964).

While Respondents concede the premises rule is applicable to an employer-owned road, they contend the premises rule is inapplicable here because Flag Creek Road is owned by BP, not Condustrial. *But see Williams*, 245 S.C. at 381-82, 140 S.E.2d at 603 ("It is true that an accidental injury is not rendered compensable by the mere fact that it occurred on the employer's premises; but the fact that the claimant was rightfully upon the premises controlled by the employer, as a result of her employment, and was leaving over the employer's premises as contemplated at the close of the day's work, made the act of leaving 'in the course of' her employment."). Thus, it is appropriate to consider whether Cook's injury occurred "while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises." *Davaut*, 418 S.C. at 633, 795 S.E.2d at 681 (quoting *Williams*, 245 S.C. at 381, 140 S.E.2d at 603); *see also Evans v. Coats & Clark*, 328 S.C. 467, 468-69, 492 S.E.2d 807, 807-08 (Ct. App. 1997) (finding employee was entitled to workers' compensation benefits where she was injured in the lobby of the building where her employer leased office space even though the lobby was a common area not owned or controlled by the employer, reasoning that the lobby was effectively part of the employer's premises because it was an area over which the employer had a right of passage and it was along a route commonly used by employees to access and exit the work premises).

Our review of the record reveals the BP plant is not "in practical effect" a part of Condustrial's premises. In fact, Cook properly noted before the Appellate Panel that "Condustrial owns no work sites. It owns no building other than its administrative building where it processes information for its workers that they then send out to jobs around South Carolina in various industrial setting[s]." Still, Cook argues his accident is compensable under the fourth exception to the going and coming rule because "the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment." *Sola*, 244 S.C. at 14, 135 S.E.2d at 326; *see also Eargle v. S.C. Elec. & Gas Co.*, 205 S.C. 423, 32 S.E.2d 240, 243-44 (1944) (finding under "the peculiar and unusual facts of this case," a maintenance worker instructed to report to work on Christmas morning to address an emergency at a gas company plant on the North shore of the Broad River was covered under the Act via an express or implied requirement of his employment contract when he drowned while attempting to boat to the plant from the South shore in dense fog enshrouding the lake and the river). We agree.

Cook testified he was instructed to take Flag Creek Road when leaving the BP plant in the direction of I-526. Anderson's testimony confirmed these instructions. On cross-examination, both Cook and Anderson acknowledged they could take either Flag Creek Road or Amoco Road, the two available roads on the BP plant complex, depending on the direction they were heading after leaving the plant. Cook used Flag Creek Road because it was the fastest and most direct way home, and he was still on BP's premises when he was injured. Because Condustrial has no work site for the industrial employees it places, the only premises at issue here is the BP plant where Phillips—

as Condustrial's client—placed Cook. *See*, *e.g.*, *Hayes v. Gibson Hart Co.*, 789 S.W.2d 775, 779 (Ky. 1990) (finding employee's injury, which occurred while coming to work after entering private owner's premises, was a work-related injury for which contractor's employee could recover workers' compensation benefits because "employee's work assignment placed him where he was exposed to the injury for which he [sought] compensation and he could not have been there otherwise"); *Burke v. Wilfong*, 638 N.E.2d 865, 869 (Ind. Ct. App. 1994) (holding that because accident which caused contractor's employee's injury occurred on owner's premises when employee was arriving for work, injury arose out of the employment and recognizing that "courts in other jurisdictions have held that when a contractor's employee is performing work pursuant to a contract on another company's property, that property is considered the employer's property for worker's compensation purposes"); *Downey v. Vanderlinde Elec. Corp.*, 95 N.Y.S.2d 685, 686 (N.Y. App. Div. 1950) (finding place where employer's contract was being performed is deemed the employer's plant and is treated "in its facilities for ingress and egress as would such facilities of the employer's own plant"; thus, employee was entitled to compensation when injured in private parking lot available for those working on premises of third party for whom employer was doing electrical work).

***7** The place of Cook's injury—the BP-owned road Cook was instructed to use to access the work area to which he was assigned by Condustrial's client—was brought within the scope of his employment with Condustrial as a requirement of his work.

Thus, for the reasons stated above, we reverse the Appellate Panel's findings addressing the premises rule and applicable exception to the going and coming rule. Cook's injuries arose out of and in the course of his employment because the injuries occurred on the premises of the BP plant to which he had been assigned, on a road he had been instructed to use to gain access to and exit his work site.

REVERSED AND REMANDED.

THOMAS and HEWITT, JJ., concur.

All Citations

Not Reported in S.E. Rptr., 2025 WL 2612712

Footnotes

1 The parties agreed "that Condustrial, Inc., is the proper Employer and that Benchmark Insurance Company is the proper Carrier for Condustrial."

2 The plant is accessible from Cainhoy Road (State Highway S-8-98) by two private roads crossing the property—Amoco Drive and Flag Creek Road.

3 Amoco, BP's predecessor at the plant, constructed both Amoco Road and Flag Creek Road in 1978. Neither road serves any public transportation purpose other than ingress to and egress from the plant.

4 BP's corporate designee explained the protective coating was applied to prevent a spill of hydrobromic acid from eating up the cement ramp; she further agreed that protecting infrastructure was an integral part of the plant's manufacturing process.

5 In *Howell*, the supreme court held a millworker struck while crossing a public street connecting an employer-maintained parking lot and one of the mill's main entrances suffered no compensable injury because she was dropped off in front of the mill, exited directly onto the public street, and never entered the employer's parking lot before she was injured. *Id.* at 471-74, 354 S.E.2d at 385-86.

2025 WL 2612712

End of Document

2025 WL 2612708
Only the Westlaw citation is currently available.

Court of Appeals of South Carolina.

James FRESHLEY, Claimant, Appellant,
v.
CONBRACO INDUSTRIES, INC.,
Employer, and Great American Alliance Insurance Company, Carrier, Respondents.

Appellate Case No. 2023-000185
|
Unpublished Opinion No. 2025-UP-310
|
Heard February 12, 2025
|
Filed September 10, 2025

Appeal from the Workers' Compensation Commission

Attorneys and Law Firms

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David Alan Wilson, of Wilson & Englebardt, LLC, of Greenville, for Respondents.

Opinion

PER CURIAM:

***1** Appellant James Freshley appeals the South Carolina Workers' Compensation Commission's (the appellate panel) order denying his claim that he suffered a disabling occupational disease. Freshley challenges the appellate panel's denial on the grounds that the appellate panel erred by (1) failing to properly apply the legal standard for occupational disease contrary to the substantial evidence and (2) failing to find that Freshley suffered from a disabling occupational disease. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

In August 2019, Freshley filed a claim seeking workers' compensation benefits on the ground that he suffered from reactive airway disease—occupational asthma—as a result of exposure to chemicals during his employment at Respondent Conbraco Industries (Conbraco), a valves manufacturer.

Freshley worked for Conbraco from 2007 to 2020. During most of his employment, Freshley worked on the "zinc line"—which required bathing manufactured parts in a variety of chemicals—a process that emitted visible fumes. The zinc line was located in the shipping department alongside other processes that used chemicals. In May 2019, Freshley informed Renee Chaisson, Conbraco's human resources manager, that he believed fumes from the zinc coating process were causing him to experience shortness of breath. On May 8, 2020, while Freshley was out on leave for unrelated surgery, he and thirteen other employees were laid off.

In February 2019, Freshley had expressed concern to his cardiologist, Dr. Prabal Guha, that exposure to workplace chemicals may be causing his shortness of breath. While Freshley had previously experienced shortness of breath related to an atrial fibrillation (afib) diagnosis, the shortness of breath persisted even when his afib had successfully been treated. Dr. Guha referred Freshley to Dr. Vinod Jona, a pulmonologist, to address the issue.

After ordering a series of tests including a CT scan, a VQ scan, and spirometry tests, Dr. Jona diagnosed Freshley with occupational asthma. Dr. Jona found that his chemical exposure in the workplace was clinically significant, there was a temporal association between the exposure and symptom onset, and Freshley worked in an occupation known to be at risk for the development of lung disease. Dr. Jona referred Freshley to Dr. Robert Miller, another pulmonologist, to verify the cause of his symptoms.

Dr. Miller ultimately agreed with Dr. Jona that Freshley's symptoms were consistent with reactive airway disease—i.e., occupational asthma—caused by exposure to chemicals in the workplace. Dr. Miller conducted several tests, including a spirometry test, an x-ray, a diffusion test, a cardiopulmonary stress test (CPET), a CAT scan, and a pulmonary function test (PFT), to exclude alternative causes of Freshley's shortness of breath such as cardiopulmonary disease, pleural disease,

and chronic obstructive pulmonary disease. Additionally, Dr. Miller referred Freshley to Dr. John Sturdivant, a cardiologist specializing in electrophysiology, to determine the relationship between Freshley's cardiac issues and his shortness of breath. Dr. Sturdivant concluded Freshley's cardiac issues were not the cause of his shortness of breath.

***2** During Dr. Miller's deposition, after viewing Material Safety Data Sheets (MSDS) for the seventeen chemicals used in Conbraco's shipping department, he testified that while he had not seen the MSDS prior to this deposition, his diagnosis was consistent with exposure to these chemicals. On cross-examination, Dr. Miller conceded that, while treating Freshley, he did not have an independent source of information as to the type and extent of chemical exposure other than Dr. Jona's notes and Freshley's self-report.

In June 2021, a single commissioner held a hearing on Freshley's workers' compensation claim.[1] Freshley, Chaisson, and Karen Brooks, Conbraco's environmental health and safety manager, testified at the hearing. Other medical evidence consisted of patient notes from Dr. Guha, Dr. Jona, Dr. Miller, and Dr. Sturdivant; deposition testimony from Dr. Miller and Dr. Sturdivant; and medical test results. The MSDS were also before the single commissioner. Additionally, Conbraco entered into evidence the medical opinion of Dr. Gregory Feldman[2] in the form of a two-page letter.

Dr. Feldman disagreed with Freshley's diagnosis. Dr. Feldman explained that reactive airways dysfunction syndrome[3] is not an appropriate diagnosis if the treating physician lacks a "clear understanding of the chemical involved [and] the extent of the exposure" and has not ruled out alternative explanations for the patient's symptoms. In Dr. Feldman's opinion, Dr. Miller failed to exclude other causes of Freshley's shortness of breath. Dr. Feldman ultimately concluded the medical evidence did not support a diagnosis of reactive airway dysfunction syndrome because the diagnosis requires an exclusion of alternative explanations, and he believed the "presence of multiple comorbidities more than adequately explain[ed] all [Freshley's] symptoms." Conbraco also entered into evidence an addendum to Dr. Feldman's opinion in which he noted that Freshley's complaints about shortness of breath were "highly non-specific" and had been complained of "over the years." Dr. Feldman opined that the shortness of breath was "more likely than not related to his several significant comorbidities that include anemia, obesity, and heart condition[.]"

***3** The single commissioner denied Freshley benefits on the ground that Freshley failed to meet his burden of proving a compensable injury by occupational illness to his lungs within the course and scope of his employment. Freshley appealed to the appellate panel. The appellate panel affirmed the single commissioner's order and mirrored the single commissioner's findings with a few amendments. This appeal followed.

STANDARD OF REVIEW

"Our review is limited to deciding whether the [appellate panel]'s decision is unsupported by substantial evidence or is controlled by some error of law." *Skinner v. Westinghouse Elec. Corp.*, 394 S.C. 428, 432, 716 S.E.2d 443, 445 (2011). " 'Substantial evidence' is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [appellate panel]." *Pack v. State Dep't of Transp.*, 381 S.C. 526, 536, 673 S.E.2d 461, 466 (Ct. App. 2009). "When the evidence is conflicting over a factual issue, the findings of the [a]ppellate [p]anel are conclusive." *Brunson v. Am. Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the [a]ppellate [p]anel." *Id.* (quoting *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Jones v. Harold Arnold's Sentry Buick, Pontiac*, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (2008) (quoting *Lee v. Harborside Cafe*, 350 S.C. 74, 78, 564 S.E.2d 354, 356 (Ct. App. 2002)).

"Where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the [appellate panel]." *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995). "[I]f all the evidence points to one conclusion or the [appellate panel]'s findings 'are based on surmise, speculation or conjecture, then the issue becomes one of law for the court ....' " *Clemmons v. Lowe's Home Centers, Inc.-Harbison*, 420 S.C. 282, 288, 803 S.E.2d 268, 271 (2017) (quoting *Polk v. E.I. duPont de Nemours Co.*, 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968)).

LAW/ANALYSIS

Freshley argues the appellate panel erred in denying his claim because its finding that he did not have an occupational disease is unsupported by the substantial evidence. We agree.

In order to receive workers' compensation benefits for contracting an occupational disease, a claimant must (1) prove a disease, and:

2. The disease must arise out of and in the course of the claimant's employment;

3. The disease must be due to hazards in excess of those hazards that are ordinarily incident to employment;

4. The disease must be peculiar to the occupation in which the claimant was engaged;

5. The hazard causing the disease must be one recognized as peculiar to a particular trade, process, occupation, or employment; and

6. The disease must directly result from the claimant's continuous exposure to the normal working conditions of the particular trade, process, occupation, or employment.

Fox v. Newberry Cnty. Mem'l Hosp., 319 S.C. 278, 281, 461 S.E.2d 392, 394 (1995) *see* S.C. Code. Ann. § 42-11-10(A); *see also Sturkie v. Ballenger Corp.*, 268 S.C. 536, 542, 235 S.E.2d 120, 123 (1977) ("The settled rule is that where the work and its own environment of circumstance expose the employee to the happening of an event causing an accident, the accident arises out of the employment."). "An occupational disease is one which develops over a period of time as opposed to an injury that is attributable to a one-time event." *Brunson*, 395 S.C. at 456, 718 S.E.2d at 759. "[C]ircumstantial evidence may be used to prove causation." *Mullinax*, 318 S.C. at 437, 458 S.E.2d at 80.

***4** "Expert medical testimony is designed to aid the [appellate panel] in coming to the correct conclusion. Therefore, the [appellate panel] determines the weight and credit to be given to the expert testimony. Once admitted, expert testimony is to be considered just like any other testimony." *Corbin v. Kohler Co.*, 351 S.C. 613, 624, 571 S.E.2d 92, 98 (Ct. App. 2002) (citations omitted). However, "a medical opinion which conflicts with the physical facts will not be permitted to control the determination of a factual controversy." *Poston v. Se. Const. Co.*, 208 S.C. 35, 38, 36 S.E.2d 858, 860 (1946) (quoting *Moyle v. Mutual Life Ins. Co.*, 201 S.C. 146, 21 S.E.2d 561, 564 (1942)).

The appellate panel concluded that Freshley did not sustain any compensable occupational disease, noting its findings were "based primarily on the medical evidence" and that the medical evidence did not support "a causal connection" between Freshley's medical symptoms and any alleged exposure at work. The appellate panel made the following findings to support its decision:

> 23. It is noteworthy that none of the treating or evaluating physicians had specific details regarding the specific department in which [Freshley] worked or any specific chemicals to which [Freshley] was directly exposed and for what amounts of time, if any.
>
> 24. Additionally, none of the physicians could exclude [Freshley's] serious pre-existing comorbidities as the basis or at the very least a contributing factor to [Freshley's] medical condition. As such, the undersigned could not exclude those factors as well....
>
> 25. In reaching our conclusion that [Freshley] has failed to meet his burden of proof, specifically, *we give great weight to the opinions and testimony of Dr. Feldman* .... Dr. Feldman was uniquely positioned to comprehensively review all of the *relevant* medical evidence, including Dr. Miller's testimony, and after doing so, was unable to draw a causal relationship between [Freshley's] employment and his symptoms, but instead concluded that the presence of [Freshley's] multiple comorbidities more adequately explained [Freshley's] symptoms. He further found that the diagnosis of [reactive airway dysfunction syndrome] was neither supported by the required criteria for exclusion of alternative explanations nor was it supported by any reliable medical evidence.
>
> 26. In fact, in analyzing the evidence and reaching his conclusions, Dr, Feldman noted, among other things, that it was no longer appropriate for any physician to make a [reactive airway dysfunction syndrome] diagnosis without a clear understanding of the chemical involved and the extent of exposure. *No one has been able to identify with any specificity the chemicals to which [Freshley] was supposedly exposed* and even Dr. Miller acknowledged during his deposition that he could not say exactly to what chemical [Freshley] was exposed. For this, among other reasons, we find that Dr. Feldman's conclusions

> are not based on conjecture or speculation but are well supported by reliable and probative evidence contained in the record. Accordingly, we give greater weight to his opinions and conclusions than to any other treating or evaluating specialist.

(emphases added).

We hold the appellate panel erred in denying Freshley's claim because the substantial evidence in the whole of the record does not support the appellate panel's findings. *Skinner*, 394 S.C. at 432, 716 S.E.2d at 445 ("Our review is limited to deciding whether the [appellate panel]'s decision is unsupported by substantial evidence or is controlled by some error of law."). While this court must not second-guess the appellate panel's weighing of evidence, the factual conclusions of the appellate panel may be reversed "if they are arbitrary or clearly wrong ...." *Russell v. Wal-Mart Stores, Inc.*, 445 S.C. 387, 394–95, 914 S.E.2d 838, 842 (2025); *Etheredge v. Monsanto Co.*, 349 S.C. 451, 456, 562 S.E.2d 679, 681 (Ct. App. 2002) ("A court 'may not substitute its judgment for that of any agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.' " (quoting *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999))).

***5** Here, the substantial physical evidence in the record does not support appellate panel's findings. *Pack*, 381 S.C. at 536, 673 S.E.2d at 466 (" 'Substantial evidence' is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [appellate panel]."). First, the appellate panel found it "noteworthy" that Freshley's physicians did not have specific details about the department where he worked or the specific chemicals to which he was exposed. However, medical notes in the record indicate that Dr. Jona and Dr. Miller specifically discussed Freshley's job description, the length of time he had been in that position, and at least some of the chemicals to which he was exposed while in that position. Doctors are trusted to be able to differentiate between self-serving or unreliable information shared by patients and that which is medically relevant or significant. *See Clark v. Philips Elecs./Shakespeare*, 433 S.C. 186, 193–94, 857 S.E.2d 378, 381 (Ct. App. 2021) ("What people say when seeking medical help is usually self-serving and sometimes unreliable. Doctors are trained to detect such things, and we are confident that if the doctors believed they were duped into their opinions they would have said so."). Further, the MSDS for the seventeen chemicals in the shipping department revealed that many of the chemicals used in that department were harmful if inhaled as a vapor, mist, or fume. Dr. Miller testified that exposure to the chemicals on the MSDS was consistent with his opinion that Freshley's reactive airway disease was caused by exposure at his workplace.

Second, the appellate panel found that none of the physicians excluded Freshley's comorbidities as the basis of or as a contributing factor to his medical condition. However, this finding contradicts the conclusions reached by the physicians who physically treated Freshley. *Russell*, 445 S.C. at 394–95, 914 S.E.2d at 842 (noting that the factual conclusions of the appellate panel may be reversed "if they are arbitrary or clearly wrong"). The record contains evidence that Freshley's shortness of breath was *not* explained by any of his comorbidities: Dr. Miller, Dr. Jona, Dr. Guha, and Dr. Sturdivant all examined Freshley and ordered tests to determine the cause or causes of Freshley's shortness of breath, and both Dr. Jona and Dr. Miller determined his symptoms were caused by occupational asthma and not by comorbidities or other conditions. Dr. Sturdivant eliminated Freshley's cardiac issues as the cause of his shortness of breath. While the appellate panel is free to disregard these tests and conclusions, *Russell*, 445 S.C. at 394, 914 S.E.2d at 842 (noting that the appellate panel does not have to "accept even uncontradicted evidence"); finding that *none* of the physicians could exclude comorbidities as a cause of Freshley's shortness of breath does not comport with the record. Rather, this finding reflects the conclusion reached by Dr. Feldman, which we address below.

Finally, we hold Dr. Feldman's opinion—to which the appellate panel gave great weight—is neither reliable nor substantial because it is directly contradicted by the physical evidence in the record. *Id.* at 394–95, 914 S.E.2d at 842 ("[T]he [a]ppellate [p]anel's factual decisions may be reversed if they are arbitrary or clearly wrong[.]"); *Poston*, 208 S.C. at 38, 36 S.E.2d at 860 ("[A] medical opinion which conflicts with the physical facts will not be permitted to control the determination of a factual controversy." (quoting *Moyle*, 201 S.C. at 146, 21 S.E.2d at 564)). Dr. Feldman concluded that Freshley's medical records did not support the diagnosis reached by Freshley's treating physicians because they lacked knowledge about the specific chemicals to which Freshley was exposed and because they failed to exclude comorbidities or pre-existing medical conditions as the cause of Freshley's symptoms, specifically shortness of breath. Dr.

Feldman ultimately concluded that Freshley did not have any asthma-like disease at all. However, Dr. Feldman did not review the MSDS, nor did he access Dr. Sturdivant's notes or deposition that ruled out Freshley's cardiac issues as the cause of his shortness of breath. Additionally, contrary to Dr. Feldman's opinion, the record contains evidence that excludes several of the conditions described by Dr. Feldman as potential alternative causes of Freshley's symptoms. For example, the record shows that Freshley had been compliant with his CPAP for years when he received the reactive airway disease diagnosis; he no longer had cardiomyopathy; and the CPET showed abnormal cardiac *and* pulmonary impairment. Additionally, the medical evidence reflects that Freshley responded to bronchodilators, which indicates the presence of a small airways disease and contradicts Dr. Feldman's conclusion that Freshley's shortness of breath stemmed not from an airway disease but rather from one of his other diagnosed conditions. Given that Dr. Feldman's opinion appears to conflict with the record as a whole, it must "not be permitted to control the determination" of the factual controversy in this case, i.e., whether Freshley suffered from an occupational disease. *Poston*, 208 S.C. at 38, 36 S.E.2d at 860.

***6** In sum, we reverse the appellate panel's decision because its findings are unsupported by reliable, substantial evidence in the record. We are not in the position to weigh the remaining evidence—Dr. Miller's deposition and notes, Dr. Sturdivant's deposition and notes, Dr. Jona's and Dr. Guha's medical notes, the hearing testimony from Freshley, Brooks, and Chaisson, the MSDS sheets, and various medical testing results—to determine the remaining elements of the *Fox v. Newberry County Memorial Hospital* six-element test. Thus, we remand to the appellate panel to apply the test to determine whether Freshley met his burden to proving he contracted an occupational disease.

As our holding on this issue is dispositive, we need not reach the remaining issues on appeal. [4] *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of prior issue is dispositive).

CONCLUSION

Based on the foregoing, the appellate panel's order is reversed and remanded.

WILLIAMS, C.J., and GEATHERS and TURNER, JJ., concur.

All Citations

Not Reported in S.E. Rptr., 2025 WL 2612708

Footnotes

1 Initially, Freshley claimed injury to his lungs, skin, and resulting headaches. The single commissioner found Freshley failed to meet his burden of proving injury by accident or occupational illness within the course and scope of his employment. On appeal, Freshley challenged the findings as to only the injury by accident or occupational disease to his lungs.

2 Dr. Feldman is triple-board certified in the specialties of internal medicine, pulmonary medicine, and critical care.

3 Notably, Freshley claimed to suffer from occupational asthma, or reactive airway disease, *not* reactive airway dysfunction syndrome. Dr. Feldman's letter refers only to reactive airway dysfunction syndrome, while Dr. Miller appears to reference both reactive airway disease and reactive airway dysfunction syndrome. At oral argument, counsel for both parties were questioned about this discrepancy. Freshley's counsel acknowledged that the terms were used interchangeably but confirmed that reactive airway disease is the alleged diagnosis. Conbraco's counsel argued these are separate, distinct diseases and conceded that Dr. Feldman's opinion spoke only about reactive airway dysfunction syndrome rather than the disease with which Freshley was

diagnosed. We have elected to treat the terms as interchangeable, consistent with the appellate panel's approach.

4 While we do not reach the remaining issues, we take note of our courts' precedent that, once an employee has proven a compensable disease, the burden of proving the percentage of the claimant's disability caused by non-compensable causes shifts to the employer. *See* *Hanks v. Blair Mills, Inc.*, 286 S.C. 378, 385, 335 S.E.2d 91, 95 (Ct. App. 1985) (holding the employer failed to present any evidence of the percentage of the claimant's disability caused by non-compensable causes); *Mizell v. Raybestos-Manhattan, Inc.*, 281 S.C. 430, 434, 315 S.E.2d 123, 125 (1984) (holding that though the evidence revealed the claimant had smoked cigarettes for years and smoking can cause lung cancer, the employer and its insurer failed to elicit medical testimony that smoking caused a percentage of the disability which resulted in death).

2025 WL 1825697
Only the Westlaw citation is currently available.

Supreme Court of South Carolia.

Jon A. HINSON, Employee, Respondent,
v.
BS TELECOMMUNICATIONS, Employer, and
Old Republic Insurance Co., Carrier, Defendants,
of which BS Telecommunications is the Appellant.

Appellate Case No. 2022-000581
|
Memorandum Opinion No. 2025-MO-036
|
Heard June 3, 2025
|
Filed July 2, 2025

Appeal from the Workers' Compensation Commission

Attorneys and Law Firms

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Alton Lamar Martin, Jr., of Martin & Martin Attorneys, PA, of Greenville, for Respondent.

Opinion

PER CURIAM:

***1** BS Telecommunications and its carrier, Old Republic Insurance Co., (collectively, Employer) appeal the order of the South Carolina Workers' Compensation Commission (the Commission) imposing a sanction of $11,580 for the failure to pay $3,825 for Jon E. Hinson's medical expenses, requiring payment of $3,625 to the provider for the medical expenses, and awarding Hinson $1,400 in attorney's fees plus costs. We affirm.

On August 20, 2016, Hinson fell off a twenty-eight-foot extension ladder while working for Employer, injuring both ankles and his back. In an August 16, 2017 consent order, the parties agreed Employer would provide all causally-related medical treatment by Dr. Mullen, Hinson's psychiatrist. A single commissioner signed this consent order. Employer, however, failed to pay for this treatment. Hinson, therefore, paid for the treatment in order to continue seeing Dr. Mullen.

On March 19, 2020, the parties entered into an Agreement and Final Release (Clincher Agreement), which provided in pertinent part: "Employer and carrier will pay any previously authorized medical expenses to medical providers that were incurred prior to February 13, 2020, but have inadvertently not been paid as of the date of this agreement ...." The Clincher Agreement listed Dr. Mullen as providing authorized treatment. Hinson, his attorney, and Employer's attorney signed this agreement, which was filed with the Commission on March 23, 2020. Because all parties were represented by counsel, the Clincher Agreement was not signed by a commissioner.

On March 29, 2021, Hinson filed a motion to compel with the Commission, asserting Employer failed to pay all of the previously authorized medical expenses required by the Clincher Agreement. In addition to payment of the medical expenses owed, he requested the imposition of sanctions and an award of attorney's fees and costs under section 42-3-175(A) of the South Carolina Code (2015). [1] The single commissioner found the Clincher Agreement addressed Employer's obligation to pay the authorized medical expenses and the fact that Hinson had paid these expenses did not change this obligation. It ordered Employer to pay (1) $3,625 directly to Dr. Mullen's office; [2] (2) $1,400 in attorney's fees for four hours at the rate of $350 per hour to Hinson's attorney; (3) $50 in costs to Hinson; and (4) a fine of $500 per day from March 23, 2020, to April 12, 2021, for failure to pay the authorized medical expenses, noting Employer's failure to pay the $200 it conceded it owed and failure to pay the remaining $3,625 served as independent grounds for the sanction. Employer appealed to the Commission, which reduced the fine imposed to $30 per day, for a total of $11,580, but otherwise affirmed the single commissioner's order. Employer then appealed to the court of appeals, and this court certified the appeal pursuant to Rule, 204(b), SCACR.

***2** Employer argues that because section 42-3-175(A)(1) only applies to orders and the Clincher Agreement was not an order, the Commission did not have the authority to sanction it for a violation of the Clincher Agreement. We need not address this argument to affirm the Commission's imposition of sanctions. The August 16, 2017, consent order, which required Employer to pay for Hinson's treatment with Dr.

Mullen and was signed by a commissioner, is unquestionably an order. Thus, section 42-3-175(A) authorizes sanctions against Employer for violating this order. Employer failed to pay the $3,825 incurred for Hinson's treatment by Dr. Mullen, which caused Hinson to have to pay $3,625 out of pocket in order to continue his treatment. To date, Employer has paid $200 to Dr. Mullen, only after Hinson filed the motion to compel, and has yet to pay the remaining $3,625 that the consent order required it to pay. This failure to pay, which was without good cause and constituted wilful disobedience of the consent order, supported the Commission's imposition of sanctions and award of attorney's fees and costs.

We find no merit in Employer's argument that the Commission's sanction of $11,580 for failure to pay $3,825 violated its constitutional rights. This amount was well under the ten to one ratio Employer asserted was appropriate at the Commission hearing. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011) ("A litigant cannot concede an issue at trial and then raise it on appeal.").

We also find no merit in Employer's argument concerning the reasonableness of the attorney's fees the Commission awarded. The factors a trial court should consider in determining reasonable attorney's fees are "1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). Here, the Commission held Employer must pay for four hours of attorney's fees at the rate of $350 an hour for preparing and filing the motion to compel and attending the motion hearing. It explained that "[t]he hourly rate for [Hinson's] attorney is based on his thirty (30) years of legal experience and is consistent with the going rate for claimant's attorneys with like-experience in the field of South Carolina Workers' Compensation." While the Commission did not list the *Blumberg* factors, its findings sufficiently addressed the factors to support the reasonableness of the attorney's fees awarded. *See Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 435 (Ct. App. 2005) (stating an appellate court will affirm an award of attorney's fees as "long as sufficient evidence in the record supports each factor").

Finally, we disagree with Employer's argument that it should not have to pay Dr. Mullen for the treatment for which Hinson had already paid. The consent order unambiguously required Employer to pay for Hinson's treatment with Dr. Mullen.[3] The Clincher Agreement did not alter this obligation. Rather, it required Employer to pay "any previously authorized medical expenses to medical providers ... [that] have not been paid ...." Accordingly, we hold the Commission did not err in ordering Employer to pay Dr. Mullen the $3,625 it had failed to pay.

***3** For the above stated reasons, the Commission's order is

AFFIRMED.

KITTREDGE, C.J., FEW, JAMES, HILL and VERDIN, JJ., concur.

All Citations

Not Reported in S.E. Rptr., 2025 WL 1825697

Footnotes

1 § 42-3-175(A) ("If a claimant brings an action before the commission to enforce an order authorizing medical treatment or payment of benefits and the commission determines that an insurer, a self-insured employer, a self-insured fund, or an adjuster, without good cause, failed to authorize medical treatment and/or pay benefits when ordered to do so by the commission, the insurer, the self-insured employer, the self-insured fund, or the adjuster must pay the claimant's attorneys' fees and costs of enforcing the order. The commission may impose sanctions for wilful disobedience of an order, including, but not limited to, a fine of up to five hundred dollars for each day of the violation.").

2 After Hinson filed the motion to compel, Employer paid $200 to Dr. Mullen.

3 Employer argues on appeal that the Commission erred in using the consent order to interpret the Clincher Agreement. However, when Employer raised its parol evidence objection to the consent order and emails, the single commissioner reminded it that the consent order, as part of the Commission's file, was in the record. Employer conceded “that's fine” and limited its objection to the emails. Therefore, Employer cannot dispute consideration of the consent order on appeal *See* *CFRE, LLC*, 395 S.C. at 81, 716 S.E.2d at 885 (“A litigant cannot concede an issue at trial and then raise it on appeal.”).

2025 WL 1250429
Only the Westlaw citation is currently available.

Court of Appeals of South Carolina.

Pablo LOPEZ, Claimant, Appellant,

v.

ALAN F. MCNEAL, LLC, Employer,
and South Carolina Uninsured
Employers' Fund, Carrier, Respondents.

Appellate Case No. 2022-001012
|
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Appeal From the Workers' Compensation Commission

Attorneys and Law Firms

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Jared Cyle Williams, of Mount Pleasant, for Respondent South Carolina Uninsured Employers' Fund.

Opinion

PER CURIAM:

***1** Pablo Lopez appeals an order of the Appellate Panel of the South Carolina Workers' Compensation Commission, which uphheld a finding by the single commissioner that Lopez was not covered under the South Carolina Workers' Compensation Law (the Act) [1] because he was an independent contractor, not an employee. We affirm pursuant to Rule 220(b), SCACR.

We hold the Appellate Panel did not err in finding Lopez was an independent contractor because Lopez failed to prove he was an employee of Alan McNeal, LLC (McNeal). *See McLeod v. Piggly Wiggly Carolina Co.*, 280 S.C. 466, 469, 313 S.E.2d 38, 39 (Ct. App. 1984) ("No award under the Workers' Compensation Law is authorized unless the employer-employee or master-servant relationship existed at the time of the alleged injury for which claim is made."); *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015) ("The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence."); *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) ("Because the question is jurisdictional, the [c]ourt may take its own view of the preponderance of the evidence."); *Lewis*, 411 S.C. at 641, 770 S.E.2d at 395 ("We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the ... Act; accordingly, only exceptions and restrictions to coverage are strictly construed."). We find the right of control, furnishing of equipment, and method of payment factors weighed in favor of finding Lopez was an independent contractor. *See Wilkinson*, 382 S.C. at 299, 676 S.E.2d at 702 ("[T]he determination of whether a claimant is an employee or independent contractor focuses on the issue of control, specifically whether the purported employer had the right to control the claimant in the performance of his work."); *id.* ("In evaluating the right of control, the [c]ourt examines four factors which serve as a means of analyzing the work relationship as a whole: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire."); *id.* at 307, 676 S.E.2d at 706 ("[T]he common law factors—right or exercise of control, method of payment, furnishing of equipment[,] and right to fire—should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor."). First, the evidence showed Lopez did not have set work hours, was allowed to determine how many people to bring to the job site, was given the blueprints for the framing job, was only told generally to keep the job site clean, and testified that he framed this house the same way he framed every other house. Therefore, we find the right to control factor weighed in favor of finding Lopez was an independent contractor. *See Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969) ("It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of

its accomplishment."); *id.* at 196, 165 S.E.2d at 805 ("[T]he reserved control, to have the effect of making the relation that of employer and employee 'must be both general and special, and not only as to what work shall be done, but also how it shall be done.' " (quoting *Rogers v. Florence R.R. Co.*, 31 S.C. 378, 388, 9 S.E. 1059, 1062 (1889))). Second, we find the furnishing of equipment factor also weighed in favor of finding Lopez was an independent contractor because Lopez was expected to bring all his own tools to the job site and owned all the tools necessary to complete the job, except one nail gun that he possibly borrowed from McNeal without McNeal's knowledge. *See Ramirez v. May River Roofing, Inc.*, 433 S.C. 519, 529, 860 S.E.2d 680, 685 (Ct. App. 2021) ("An owner who purchases and supplies equipment tends to retain the right to control how the equipment is used. The inference of control in this situation 'is a matter of common sense and business.' " (quoting *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 479, 753 S.E.2d 416, 421 (2013))). Third, although it was unclear whether McNeal agreed to pay Lopez by the job or by the week, it was clear that the full amount for Lopez and the three other workers was paid to Lopez, who kept a larger portion, and the four men decided amongst themselves how the payment would be divided without input from McNeal; therefore, the method of payment factor weighed in favor of finding Lopez was an independent contractor. *See Lewis*, 411 S.C. at 645, 770 S.E.2d at 397 ("When considering [the method of payment] prong, typically a court looks to whether the claimant was paid by the job or by the hour and how the claimant filed her taxes."). Lastly, we find there is insufficient evidence in the record to analyze the right to fire factor because there was no testimony about the ability to immediately terminate a working relationship or finish the job or anything about terms of the parties' working relationship. *See Ramirez*, 433 S.C. at 530, 860 S.E.2d at 686 ("The right to unilaterally and immediately end the relationship without future liability is a hallmark of an employment relationship. An independent contractor, however, typically has the right to complete the job unless the parties' agreement provides otherwise." (citation omitted)). Because we find three factors weigh in favor of finding Lopez was an independent contractor, we hold the Appellate Panel did not err in concluding Lopez was not covered under the Act. *See Wilkinson*, 382 S.C. at 307, 676 S.E.2d at 706 ("[T]he common law factors—right or exercise of control, method of payment, furnishing of equipment[,] and right to fire—should be evaluated in an evenhanded manner in determining whether the questioned relationship is one of employment or independent contractor.").

***2 AFFIRMED.** [2]

KONDUROS, MCDONALD, and VINSON, JJ., concur.

All Citations

Not Reported in S.E. Rptr., 2025 WL 1250429

Footnotes

1 S.C. Code Ann. §§ 42-1-10 to 42-19-50 (2015 & Supp. 2024).

2 We decide this case without oral argument pursuant to Rule 215, SCACR.

2025 WL 643886
Only the Westlaw citation is currently available.

Court of Appeals of South Carolina.

Amy PEREZ, Claimant, Appellant,

v.

AMAN MEDICAL TRANSPORT, LLC, Employer, and SC Uninsured Employers' Fund, Carrier, Respondents.

Appellate Case No. 2023-001944
|
Unpublished Opinion No. 2025-UP-071
|
Submitted February 19, 2025
|
Filed February 26, 2025

Appeal From The Workers' Compensation Commission

Attorneys and Law Firms

Andrew David Smith, of Poulin, Willey, Anastopoulo, LLC, of Charleston, for Appellant.

Samuel Thompson Brunson, of Samuel T. Brunson Law Offices, of Florence; and Lisa C. Glover, of Columbia, both for Respondent SC Uninsured Employers' Fund.

Opinion

PER CURIAM:

***1** This is a workers' compensation case arising out of a car accident. Amy Perez was driving an ambulance owned by her employer, Aman Medical Transport, LLC (Aman Medical), when a collision occurred between the ambulance and a vehicle driven by a third party. Perez suffered substantial injuries and sought workers' compensation benefits from Aman Medical. The South Carolina Uninsured Employers' Fund (the Fund) was named as the carrier. While the case was pending before the commission, Perez settled with the third party. The commission found that this settlement was an "election of remedy" and that Perez had waived her rights to any workers' compensation benefits. We affirm pursuant to Rule 220(b), SCACR.

The law allows a claimant to "proceed against both the employer-carrier and [a] third party tort feasor" for job-related injuries. *Fisher v. S.C. Dep't of Mental Retardation-Coastal Ctr.*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982). But to do so, the claimant must comply with section 42-1-560 of the South Carolina Code (2015). *Fisher*, 277 S.C. at 575, 291 S.E.2d at 201. Section 42-1-560(b) "provides for a lien in favor of the carrier on the proceeds of any recovery from the third party." *Hudson v. Townsend Saw Chain Co.*, 296 S.C. 17, 22, 370 S.E.2d 104, 107 (Ct. App. 1988). The statute also requires notice of a third-party action to the employer, carrier, and commission for the purpose of preventing "any prejudice to the employer and carrier 'as a result of the employee's decision to attempt a third-party recovery.' " *Id.* at 20, 22, 370 S.E.2d at 106–07 (quoting 2A LARSON § 73.30 at 14–336 (1987)). It follows that a settlement made between an injured employee and a third party, without the carrier's consent, constitutes an election of remedy and a waiver of the employee's rights to workers' compensation benefits. *Fisher*, 277 S.C. at 575, 291 S.E.2d at 201; *see also Johnson v. Pennsylvania Millers Mut. Ins. Co.*, 292 S.C. 33, 38–39, 354 S.E.2d 791, 794 (Ct. App. 1987) (reiterating *Fisher*'s holding that a claimant's settlement with a third party without the carrier's consent and without regard to the carrier's lien is an election of remedy and bars workers' compensation).

These principles clearly apply to the case at hand. The Fund had a right to any third-party recovery that Perez obtained. Nevertheless, Perez settled her third-party claims without giving proper notice to the Fund or obtaining the Fund's consent. The fact that Perez never commenced an action against the third party is of no moment because, as already noted, an injured person must comply with the statute in order to seek both a tort recovery and workers' compensation benefits. *See Fisher*, 277 S.C. at 575, 291 S.E.2d at 201. Perez's actions ultimately stripped the Fund of its right to reimbursement. Accordingly, we conclude Perez elected her remedy and waived her right to seek workers' compensation benefits.

AFFIRMED. [1]

THOMAS, HEWITT, and CURTIS, JJ., concur.

All Citations

Not Reported in S.E. Rptr., 2025 WL 643886

Footnotes

1 We decide this case without oral argument pursuant to Rule 215, SCACR.

445 S.C. 387
Supreme Court of South Carolina.

Paula RUSSELL, Claimant, Petitioner,
v.
WAL-MART STORES, INC., Employer, and
American Home Assurance, Carrier, Respondents.

Appellate Case No. 2023-000403
|
Opinion No. 28258
|
Heard October 1, 2024
|
Filed January 29, 2025
|
Rehearing Denied May 8, 2025

Synopsis

Background: Claimant who suffered a back injury while working at a retail store appealed the Workers' Compensation Commission's denial of her claim for additional benefits, including surgery, based on a change in condition since the initial award. The Court of Appeals, 415 S.C. 395, 782 S.E.2d 753, reversed and remanded. On remand, the Commission remanded claimant's change-of-condition claim to a single commissioner for what would have been a third ruling on the same claim. Claimant appealed. The Court of Appeals dismissed and remanded. After granting claimant's petition for a writ of certiorari, the Supreme Court, 426 S.C. 281, 826 S.E.2d 863, reversed, finding that the Commission's delay in making a final decision left claimant without an adequate remedy, and remanded to an appellate panel of the Commission for immediate review. On remand, the appellate panel again found claimant failed to prove a change of condition. Claimant appealed, the Court of Appeals, 2022 WL 17174887, affirmed, and the Supreme Court again granted claimant's petition for a writ of certiorari.

The Supreme Court, Hill, J., held that claimant's claim for additional benefits based on a change of condition was supported by substantial evidence and the appellate panel's decision to the contrary was clearly erroneous and arbitrary.

Reversed and remanded with instructions.

Procedural Posture(s): Petition for Writ of Certiorari; Review of Administrative Decision.

****839 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal From the South Carolina Workers' Compensation Commission

Attorneys and Law Firms

C. Daniel Vega and James David George, Jr., both of Smith, Born, Leventis, Taylor & Vega, LLC, of Columbia, for Petitioner.

Johnnie W. Baxley, III, of Willson Jones Carter & Baxley, P.A., of North Charleston, for Respondents.

Opinion

JUSTICE HILL:

***389** The issue in this workers' compensation case is whether the claimant, Paula Russell, proved her physical condition has changed since her initial workers' compensation award. The Appellate Panel of the Workers' Compensation Commission found she did not and denied her request for surgery and other additional benefits. We now reverse and remand this case to the Workers' Compensation Commission with instructions to award Russell benefits.

I.

Russell injured her back in 2009 while working as an assistant manager at Wal-Mart. She reached maximum medical improvement in 2011. Dr. James Merritt IV, an orthopedic surgeon, assigned a seven percent disability rating to Russell's lumbar spine. Russell sought workers' compensation benefits, and in June 2011, a single commissioner ruled she was entitled ***390** to benefits based on the seven percent permanent partial disability to her back.

Russell returned to work, but her pain and symptoms soon worsened. In December 2011, she brought this claim for additional medical treatment and other benefits based on her change of condition. In 2013, another single commissioner found Russell's condition had changed and awarded her continued medical treatment and temporary total disability benefits. The Appellate Panel reversed, concluding Russell had failed to prove her condition had worsened. From this

point, a slow-motion procedural rodeo bounced Russell's claim to the court of appeals; back to a single commissioner; then again to the Appellate Panel; back to the court of appeals; and then to this Court, which in 2019 remanded to the Appellate Panel (with exasperation) for "immediate and final review" of the single commissioner's order "in accordance with the 2016 holding of the court of appeals." *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 291, 826 S.E.2d 863, 868 (2019). The Appellate Panel then issued the order before us, again finding Russell failed to prove a change of condition. The court of appeals affirmed. *Russell v. Wal-Mart Stores, Inc.*, Op. No. 2022-UP-422, 2019 WL 1461576 (S.C. Ct. App. filed Nov. 23, 2022). We granted certiorari and now hold the Appellate Panel's denial of Russell's change of condition claim is not supported by substantial evidence.

II.

Whether a workers' compensation claimant is entitled to additional benefits based on a change of condition is governed ****840** by § 42-17-90(A) of the South Carolina Code (2015), which in relevant part states:

> On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation.

***391** To prevail on her change of condition claim, Russell must prove by the greater weight of the evidence that her physical condition has changed since the initial award and the change was caused by her original 2009 injury. *Krell v. S.C. Hwy. Dep't.*, 237 S.C. 584, 588, 118 S.E.2d 322, 323 (1961).

In ruling that Russell did not prove a change of condition, the Appellate Panel first concluded Russell's testimony suggested her current complaints and need for surgery and other medical treatment existed at the time of the original award. The Panel went on to state that the "medical records, diagnostic tests, and medical opinions do not support a physical change of condition for the worse." In coming to this conclusion, the Panel appeared to give the greatest weight to her doctors' statements about Russell's MRI scans, while rejecting their overall expert opinions and diagnoses. Both Dr. Merritt and Dr. Williams S. Edwards (Russell's spine surgeon) testified there was no significant radiographical difference between the MRIs taken before Russell's initial award and the one taken after; however, they both testified Russell had experienced a change in condition. Despite these uncontradicted medical opinions, the Panel determined Russell's alleged worsening was based "solely" on her subjective complaints. The Panel acknowledged that the opinions and reports of both Dr. Merritt and Dr. Edwards could "be cherry-picked to support either position on this change of condition dispute" and that there was "some evidence the claimant may have suffered a change of condition," but it nonetheless found Russell simply did not prove a change of condition by the greater weight of the evidence as the statute requires.

The court of appeals upheld the ruling of the Appellate Panel, finding it was supported by substantial evidence. Like the court of appeals, our scope of review of the Appellate Panel's decision is the familiar one established by § 1-23-380 of the South Carolina Code (Supp. 2024), which forbids us from substituting our judgment for the judgment of the Panel "as to the weight of the evidence on questions of fact." As relevant here, we may only disturb the Appellate Panel's decision if "substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are ... clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or ***392** ... arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." § 1-23-380(5)(e), (f); *see generally Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132–33, 276 S.E.2d 304, 305 (1981).

The Panel's decision that Russell did not prove a change of condition was clearly wrong in light of the substantial record evidence. We are mindful "substantial evidence" means only enough evidence to allow a reasonable mind to reach the same decision. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). We also are aware that a decision may be supported by substantial evidence even if two reasonable minds could draw opposite conclusions based on the same evidence. *Palmetto All., Inc. v. S.C. Pub. Servs. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

Keeping faith with our standard of review, we still cannot square the Panel's decision with a rational reading of the record. Dr. Merritt and Dr. Edwards both testified that, in their expert medical opinion, Russell's condition had worsened since the initial award. No other doctor testified. The Panel focused on the doctors' testimony that Russell's "before and after" MRI scans were comparable and suggested no change of her spinal condition. The Appellate Panel emphasized the MRI scans several times, concluding the scans trumped Russell's "subjective complaints" that her condition had worsened. We have no quibble with the Appellate Panel's conclusion that Russell's testimony alone was ****841** not enough to prove her case. The Panel had the right to weigh her testimony and gauge her credibility, as it may with any evidence. But the Panel's pitting of the MRI images against both Russell's "subjective complaints" and her doctors' considered opinions was not, under the circumstances here, a rational weighing of the evidence.

It is difficult to read the Appellate Panel's decision without wondering why it rejected the medical opinions of both of the doctors who examined and treated Russell. In its order, the Appellate Panel contended the MRI scans were not "dispositive" of Russell's claim. Yet, the only rational interpretation of the Appellate Panel's decision is that it rejected the doctors' opinions that Russell's condition had changed because the doctors also testified the MRI scans showed "no significant radiographical difference." The stubborn fact is that there was ***393** nothing else about the doctors' opinions that the Appellate Panel criticized other than the MRI scans.

To say that the Appellate Panel's decision is supported by substantial evidence means a reasonable mind could conclude the opinions of two treating surgeons that Russell's spinal condition had changed are not probative because no MRI scan confirms the change or corroborates Russell's reports of pain. But both doctors corroborated the reports of pain and placed the MRI scans in medical, clinical context. Dr. Edwards—whose testimony the Appellate Panel deemed more weighty than Dr. Merritt's—testified that, in his opinion "there is now a chronic change in that nerve that makes it more painful or more symptomatic." Dr. Edwards explained that even though the MRI showed no radiographical difference, "it's clear that the patient's symptoms are worse.... I don't have any doubts about that ... clinically." He testified his examination of Russell after the initial award revealed she had developed numbness or discomfort connected to the L5 nerve root, something he had not noticed before. He further stated that "clinically her symptoms are more significant now than they were when I first saw her." When asked by Respondent's counsel if his diagnosis was "subjective," Dr. Edwards explained the MRIs revealed no objective difference and that Russell's muscles and reflexes had not deteriorated, "[b]ut that's true for most patients that have disc herniations ... it's the symptoms of discomfort, predominantly, that can certainly worsen." Explaining the objective basis for his opinion, Dr. Edwards testified: "if you rely on the physical examination and the demonstration of these paresthesias [a numbness, tingling, or prickling sensation] that we're describing into this nerve distribution, that's part of an objective physical finding, though it does have a subjective component to it."

As we have noted, the Appellate Panel admitted there was "some" medical evidence in the record that could be "cherry-picked" to support either position on this change of condition dispute. This was a telling statement. By exalting the MRI over the uncontradicted medical opinions in the record, the Appellate Panel picked the MRI as the decisive cherry. In doing so, the Appellate Panel created a false equivalency between the medical opinions and the MRI; comparing the expert opinions to the MRIs is not cherries to cherries.

***394** While the Appellate Panel need not accept medical testimony as conclusive, here it seems the Appellate Panel accepted the MRIs as conclusive. If the doctors' testimony was right, Russell proved her claim. If they were wrong, she did not. And the Appellate Panel was free to decide the doctors were wrong as long as its explanation of how the doctors were wrong was supported by substantial evidence. *Clark v. Philips Electronics/Shakespeare*, 433 S.C. 186, 192, 857 S.E.2d 378, 380 (Ct. App. 2021) ("The Panel must anchor its ruling on evidence substantial enough to provide a reasonable basis for its findings."); *see also Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 643, 646–48, 842 S.E.2d 349, 352, 354–55 (2020). This is not a case where the medical evidence conflicts and the Appellate Panel simply relied on one opinion over the other. Rather, here the Appellate Panel concluded a surgeon's opinion that a spinal condition can worsen in the absence of a corroborating MRI was medically unsound, without any evidence or reason in the record supporting this conclusion. Without such evidence, the Appellate ****842** Panel's decision to disregard the medical opinions was not a rational one, but one reached by surmise and speculation. *Kennedy v. Williamsburg Cnty.*, 242 S.C. 477, 480, 131 S.E.2d 512, 513 (1963) (workers' compensation award "must not be based on

surmise, conjecture or speculation"). And that makes it both clearly erroneous and arbitrary.

It is true that the Appellate Panel is the ultimate fact-finder and does not have to accept even uncontradicted evidence. In this sense, the factual decisions of the Appellate Panel may appear to be akin to those implicit in a jury's verdict, which appellate courts may not generally disturb as long as the verdict can be reconciled with any evidence reasonably supporting it. But the decisions of administrative agencies, such as the Appellate Panel, are different from jury verdicts in several important respects. One difference is that juries need not explain the reasoning behind their decisions, while the Appellate Panel must. *Brayboy v. Clark Heating Co.*, 306 S.C. 56, 58–59, 409 S.E.2d 767, 768–69 (1991). Another difference is that the Appellate Panel's decisions cannot stand if they cross the line drawn by § 1-23-380. Unlike a jury verdict, the Appellate Panel's factual decisions may be reversed ***395** if they are arbitrary or clearly wrong, which they are here.

We therefore reverse the decision of the court of appeals. Rather than add to the law's delay and prolong Russell's request for relief (we would call her procedural path an odyssey, but Odysseus' journey home took only ten years), we remand her case to the commission for an immediate order granting benefits.

REVERSED AND REMANDED WITH INSTRUCTIONS.

KITTREDGE, C.J., FEW, JAMES and VERDIN, JJ., concur.

All Citations

445 S.C. 387, 914 S.E.2d 838

End of Document

2025 WL 2655752
Only the Westlaw citation is currently available.
Court of Appeals of South Carolina.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION, Respondent,
v.
WESTPOINT HOME, LLC, Appellant.

Appellate Case No. 2023-001663
|
Opinion No. 6121
|
Heard March 13, 2025
|
Filed September 17, 2025
|
Rehearing Denied November 21, 2025

Synopsis

Background: Corporation that was successor to bankrupt textile manufacturer brought declaratory judgment action against South Carolina Workers' Compensation Commission, seeking determination that Commission improperly withdrew $1.8 million corporation deposited as security for former employees' potential workers' compensation claims and that Commission could not retain unused portion of deposit after statute of repose for new claims expired, and also asked for prejudgment interest. The Circuit Court, Richland County, Alison Renee Lee, J., found for Commission. Corporation appealed.

Holdings: The Court of Appeals, Turner, J., held that:

Commission was not justified in drawing down entire $1.8 million irrevocable letter of credit;

corporation was entitled to return of unused principal of $1.16 million deposit; and

remand was warranted for circuit court to determine whether corporation was statutorily entitled to prejudgment interest.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

Appeal From Richland County, Alison Renee Lee, Circuit Court Judge

Attorneys and Law Firms

Matthew Todd Carroll, of Womble Bond Dickinson (US) LLP, of Columbia, and Herbert Beigel, of Tucson, Arizona, both for Appellant.

Michael H. Montgomery, of Montgomery Willard, LLC, and James Keith Roberts, of the South Carolina Workers' Compensation Commission, both of Columbia, for Respondent.

Opinion

TURNER, J.:

***1** WestPoint Home (WestPoint) appeals an order of the circuit court finding the South Carolina Workers' Compensation Commission (the Commission) could indefinitely retain the $1.8 million WestPoint deposited as security for potential workers' compensation claims filed by former employees after its predecessor corporation entered bankruptcy. On appeal, WestPoint argues the circuit court erred in finding (1) the Commission was justified in withdrawing the entire deposit and transferring it to an account with the State Treasurer even though the pending claims never equaled the total deposit amount and (2) the Commission could continue to retain the unused portion of the deposit indefinitely even though the statute of repose for new claims had expired. WestPoint also contends it was entitled to collect prejudgment interest. We reverse as to the first two issues and remand for further proceedings regarding the prejudgment interest issue.

FACTS

WestPoint is the corporate entity that ultimately emerged out of the dissolution of WestPoint Stevens, a South Carolina textile manufacturer that went into bankruptcy and closed in August 2005. WestPoint Stevens was a self-insured employer for purposes of its workers' compensation liabilities in South Carolina. In conjunction with the purchase of WestPoint Stevens's assets, WestPoint deposited $1.8 million in a private account to fund an irrevocable letter of credit as security for potential workers' compensation claims against WestPoint Stevens.

In 2013, WestPoint sought to reduce the security amount held by the Commission. Eventually, in April 2014, the Commission filed a declaratory judgment action seeking clarification as to whether WestPoint was entitled to receive certain information—specifically, how much of its $1.8 million deposit had been disbursed and any actuarial reports projecting how much should remain in reserve—arguing that the information was confidential and could not be disclosed outside the agency. WestPoint filed a counterclaim seeking an accounting and a declaration that it was entitled to the information as well as "all monies owed and improperly retained" by the Commission.

The parties filed various motions, and the circuit court eventually ordered the Commission to disclose the number of open claims asserted against WestPoint's funds and the balance of the funds remaining on deposit. The Commission responded that it still held approximately $1.16 million of WestPoint's initial deposit and there were no open claims. WestPoint then sought a "loss-run report" to show how many claims had been paid plus "an actuarial analysis to determine how much security, if any, would be needed for potential future claims." WestPoint subpoenaed records from Key Risk, the third-party administrator that had handled and adjusted WestPoint Stevens's claims, which showed the last payment on a claim had been made on May 7, 2008. The Commission also disclosed its actuarial formula used to calculate the amount of surety required from self-insurers, as well as records showing the Commission held a balance of $1.7 million from the drawdown of the letter of credit—$1.16 million in principal plus interest.

***2** At trial, Gary Cannon, the Commission's executive director, testified regarding the Memorandum of Understanding (MOU) governing the letter of credit between WestPoint Stevens and the Commission. The MOU stated, "[T]he Commission may at any time draw on the letter of credit, if needed, to pay any Workers' Compensation claim or claims of administration expense which are the responsibility of the employer." The MOU also stated that "if the Commission is notified that the letter of credit is being cancelled or will not be renewed and a new letter of credit ... is not filed with the Commission, the Commission may at its discretion draw on the letter credit." Cannon testified the Commission drew down the entire $1.8 million balance of the letter of credit on August 17, 2005. He acknowledged that, at the time of the withdrawal, the pending claims did not total $1.8 million, and, as of the date of trial, the Commission had "not needed $1.8 million to pay claims of former WestPoint Stevens employees."

However, Cannon explained that the Commission nonetheless drew on the letter of credit because WestPoint Stevens had notified the Commission that "no further payments [would] be made with respect to workers' compensation claims asserted" against it. Cannon stated the Commission was aware that WestPoint had assumed the obligations of WestPoint Stevens regarding the letter of credit and clarified that he was not asserting that the letter of credit had ever been cancelled or terminated. Rather, he asserted WestPoint had not truly "step[ped] into the shoes of WestPoint Stevens because they disclaimed liability." [1] Therefore, the Commission felt it "had to draw down on the letter of credit to ensure that the funds would be set aside for any future claims to be paid." Cannon agreed, however, that no WestPoint Stevens claim had been filed or paid in more than a decade, and based on the Commission's own actuarial formula used to calculate the reserve funds needed from a self-insured employer, WestPoint's surety amount dropped to $0 starting in 2012.

Cannon explained the Commission was specifically concerned about "the potential asbestos claims that could have been filed." He asserted that the Commission had a duty to "look at the potential claims coming in ... 40, 50 years later" and to ensure that money is available to pay those potential claims. He testified that although the statute of repose is two years from the last exposure, "[a]ny latent claim" is governed by the statute of limitations which allows claims to be filed "two years from the date of diagnosis."

Christopher Burkhalter, the Commission's expert witness, testified six WestPoint Stevens locations were "included on a list of jobsites where asbestos exposure was known to have occurred." Burkhalter further explained the average latency period for asbestos-related diseases range[d] from 10 to 50 years." He stated that if a twenty-year-old working for WestPoint Stevens was exposed in 2005, there "would be a 96.8 percent chance that [mesothelioma] would not have manifested" at the time of trial. Burkhalter testified it was "certainly" possible that former WestPoint Stevens employees were "alive and undiagnosed," and that the "lack of claims in recent years" had "miniscule" bearing on the likelihood of future claims.

The circuit court found the Commission "did not act improperly when it drew down the entire letter of credit in 2005" because WestPoint stated that no further payments

would be made regarding claims asserted against it, and, at that time, there were dozens of active claims pending. Thus, the circuit court reasoned, the Commission "was unquestionably entitled to draw down funds to pay those claims," and was entitled to draw down the entire amount because there was "no evidence the Commission knew how much money was needed to satisfy those claims." Additionally, the circuit court found that the interplay of the statute of limitations and the statute of repose "may narrow the pool of potential successful claims, [but did] not eliminate it," and thus, the Commission was justified in continuing to retain WestPoint's funds due to the possibility of future claims. This appeal followed.

ISSUES ON APPEAL

***3** 1. Did the circuit court err in determining the Commission was justified in withdrawing WestPoint's deposit and transferring it to an account with the State Treasurer even though there were no claims pending up to the full deposit amount?

2. Did the circuit court err in finding the Commission could continue to retain the unused portion of WestPoint's deposit even though the statute of repose for new claims had expired?

3. Is WestPoint entitled to collect prejudgment interest on the amount owed to it by the Commission?

STANDARD OF REVIEW

"In order to determine the standard of review to apply, we must look to the kind of action in which the issue involved would have been decided if there were no declaratory judgment procedure." *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). "We review questions of statutory interpretation de novo." *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022).

LAW/ANALYSIS

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). "With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute." *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 597-98, 654 S.E.2d 284, 289 (Ct. App. 2007). "The text of a statute is considered the best evidence of the legislative intent or will." *Id.* at 598, 654 S.E.2d at 289. "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "[S]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124-25, 754 S.E.2d 486, 492-93 (2014); *see also Hodges v. Rainey*, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000) ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.").

"The canon of construction *'expressio unius est exclusio alterius'* or *'inclusio unius est exclusio alterius'* holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' " *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) (quoting *Hodges*, 341 S.C. at 86, 533 S.E.2d at 582). "Where there is an express exception in a statute, all other exceptions which are not expressly set forth are e[x]cluded." *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964). "The inclusion of one exception amounts to an affirmation of the applicability of the statute's provision to all other cases which are not excepted." *Id.*

Withdrawal of Deposit

We hold the Commission improperly drew down the letter of credit because the funds were not needed for the payment of any pending claims. [2]

***4** The South Carolina Workers' Compensation Act allows corporations to "self-insure" their workers' compensation liability. *See* S.C. Code Ann. § 42-5-20(A)(1) (2015 & Supp. 2024) ("Every employer who accepts the provisions of this title relative to the payment of compensation shall insure and keep insured his liability thereunder ... or shall furnish to the [C]ommission satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due ...."). One of the ways the Commission permits a self-insurer to prove its ability to pay potential claims against it is through an MOU and irrevocable letter of credit. *See* S.C. Code Ann. Regs. 67-1507(A) (2006). "Once an irrevocable letter of credit is established, it may be revoked only with the consent of the Commission." S.C. Code Ann. Regs. 67-1507(D) (2006). "The Commission may exercise

the letter of credit at any time if the proceeds are needed for payment of a claim that occurred during the self-insured period." S.C. Code Ann. Regs. 67-1507(D)(5) (2006).

Here, the regulation at issue plainly states that the Commission may draw down the letter of credit "*if the proceeds are needed for payment of a claim*" or if "the self-insurer *fails to replace the letter with another accepted proof of compliance* [with the surety requirement]." S.C. Code Ann. Regs. 67-1507(D)(4)-(5) (2006) (emphases added). The MOU contained similar language stating that the Commission could "draw on the letter of credit, *if needed, to pay any Workers' Compensation claim* or claims of administration expense which are the responsibility of the employer." It also stated that if the Commission "is notified that the [l]etter of [c]redit is being cancelled or will not be renewed and a new letter of credit or surety bond ... is not filed ..., the Commission may, at its discretion, draw on the [l]etter."

However, on the date the Commission drew down the letter, it did not need the full $1.8 million balance to pay pending claims, and in fact, WestPoint has never had $1.8 million in claims pending against it. Moreover, the Commission was aware that WestPoint had secured WestPoint Stevens's obligations under the letter of credit, and at no time did the Commission believe the letter had been revoked or cancelled. Further, pursuant to the applicable regulations, the Commission's permission would have been required for the *irrevocable* letter of credit to be cancelled. *See* S.C. Code Ann. Regs. 65-1507(D) (2006).

Accordingly, we hold the circuit court erred in determining the Commission was justified in drawing down the entire $1.8 million letter of credit, and we reverse the circuit court as to this issue. *See Peake*, 375 S.C. at 597-98, 654 S.E.2d at 289 ("With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute."); *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) ("Regulations are interpreted using the same rules of construction as statutes."); *Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (explaining that an agency's interpretation of its own regulation is usually entitled to deference, but if "the plain language of the statute is contrary to the agency's interpretation, the [c]ourt will reject the agency's interpretation").

Return of Deposit

WestPoint asserts that the Commission has wrongfully retained the unused principal of $1.16 million because "the repose period for any new claims has closed." The Commission argues there is no statute of repose that would prohibit new claims against WestPoint Stevens, and it needs to retain the funds because of the possibility that "latent" claims involving asbestos exposure and/or pulmonary disease could arise in the future. We hold WestPoint is entitled to the return of its unused funds.

***5** "A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). A statute of repose, on the other hand, "creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Id.* "A statute of repose differs from a statute of limitations" because the "expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *Id.* (quoting *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-28 (1987)). Thus, a statute of repose "bar[s] any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury." *Id.* (alteration in original) (quoting *Black's Law Dictionary* 1451 (8th Ed. 2004)).

Section 42-15-40 of the South Carolina Code (2015) is the statute of limitations in workers' compensation cases. *See Rogers v. Spartanburg Reg'l. Med. Ctr.*, 328 S.C. 415, 418, 491 S.E.2d 708, 710 (Ct. App. 1997) (characterizing section 42-15-40 as a statute of limitation requiring any claim "to be filed within two years after an accident"). It states,

> The right to compensation under this title is barred unless a claim is filed with the commission within two years after an accident, or if death resulted from the accident, within two years of the date of death. However, for occupational disease claims the two-year period does not begin to run until the employee concerned has been diagnosed definitively as having an occupational disease and has been notified of the diagnosis.

§ 42-15-40. Section 42-11-70 of the South Carolina Code (2015) states,

> Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

In workers' compensation cases, "[t]he term 'contracted' is a term of art which has been defined for compensation purposes in occupational disease cases as 'disablement or death.' " *Vespers v. Springs Mills, Inc.*, 276 S.C. 94, 97, 275 S.E.2d 882, 884 (1981). Accordingly, "in occupational disease cases[,] compensability accrues when disability or death occurs." *Id.* (quoting *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 121, 127 S.E.2d 288, 291 (1962)); *see also Glenn v. Columbia Silica Sand Co.*, 236 S.C. 13, 21, 112 S.E.2d 711, 715 (1960) ("[T]he event to be treated 'as an injury by accident' [is] not contraction of the occupational disease, but 'disablement or death' resulting from it.").

When the term "disablement or death" is substituted for "contracted," section 42-11-70 reads as follows:

> Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease [*caused disablement or death*] within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

Thus, we hold section 42-11-70 is a statute of repose because it sets a time limitation on an event—i.e., the employee's last exposure to the hazard—separate from the event which triggers the accrual of the cause of action—i.e., diagnosis and notification. [3] *See School Bd.*, 360 S.E.2d at 327 ("The time limitation in [a statute of repose] begins to run from the occurrence of an event unrelated to the accrual of a cause of action ...."); *Hodges*, 341 S.C. at 85, 533 S.E.3d at 581 ("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."); *id.* at 88, 533 S.E.2d at 583 ("Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative.").

***6** Moreover, section 42-11-70 contains an exception to its general rule—those diseases caused by exposure to ionizing radiation. *See* § 42-11-70 ("Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, *except that due to exposure to ionizing radiation*, unless such disease was within one year after the last exposure to the hazard peculiar to his employment which caused the disease ...." (emphasis added)). Pursuant to the rules of statutory construction, "[w]here there is an express exception in a statute, all other exceptions which are not expressly set forth are e[x]cluded." *Vernon*, 244 S.C. at 157, 135 S.E.2d at 844. Here, the legislature carved out one exception to the time limitation between exposure and contraction for diseases caused by exposure to ionizing radiation. That they chose not to do so for pulmonary diseases evinces the legislature's intent to preclude compensation in such cases unless the disablement or death occurs within two years from the last exposure. *See id.* ("The inclusion of one exception amounts to an affirmation of the applicability of the statute's provision to all other cases which are not excepted."). [4]

***7** We recognize that this holding may "impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Capco*, 368 S.C. at 142, 628 S.E.2d at 41 (quoting *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54 n.6 (Minn. 2005)). However, to hold otherwise "would upset the economic balance struck by the legislative body." *Id.* "Under the plain

meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. Accordingly, we agree with WestPoint that the time period for any new claims has run because the two-year exposure period expired on August 8, 2007. We therefore reverse the circuit court's finding that the Commission could continue to hold WestPoint's funds and hold WestPoint is entitled to the return of its initial deposit plus any interest the funds have earned in the Treasury account up to the date the Commission returns the money.

Prejudgment Interest

WestPoint argues that it is statutorily entitled to prejudgment interest; the Commission asserts sovereign immunity bars the recovery of prejudgment interest. However, because the circuit court found against WestPoint regarding the propriety of the Commission's drawdown of the letter of credit and determined the Commission was entitled to retain those funds, it did not rule on WestPoint's request for prejudgment interest. Accordingly, we remand this issue to the circuit court for consideration of each party's arguments. *See TranSouth Fin. Corp. v. Cochran*, 324 S.C. 290, 297, 478 S.E.2d 63, 66-67 (Ct. App. 1996) (declining to enter judgment in favor of appellant and remanding for "an additional evidentiary hearing to determine the amount of the judgment," because although the principal amount was undisputed, the respondent challenged the judgment rate of interest). In the event the circuit court finds WestPoint is entitled to prejudgment interest, the amount to be awarded should take into consideration the interest already returned to WestPoint along with its initial deposit to prevent double recovery. *See Gipson v. Coffey & McKenzie, P.A.*, 445 S.C. 395, 399, 914 S.E.2d 842, 844 (2025) ("The law's refusal to allow a double recovery is fundamental .... A trial judge may invoke this basic common law rule to ensure the verdict amount comports with the plaintiff's actual loss." (citations omitted)); *The Winthrop Univ. Trs. for the State v. Pickens Roofing & Sheet Metals, Inc.*, 418 S.C. 142, 168, 791 S.E.2d 152, 166 (Ct. App. 2016) ("It is a fundamental rule of law in this state that there can be no double recovery for a single wrong." (quoting *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 13, 397 S.E.2d 774, 776 (Ct. App. 1990))); *see also First S. Bank v. Fifth Third Bank NA*, 631 F. App'x 121, 126 (4th Cir. 2015) (per curiam) (holding that because the parties stipulated to an amount owed that included prejudgment interest, "any award of additional prejudgment interest would amount to a windfall").

CONCLUSION

The order of the circuit court is therefore **REVERSED**, and this matter is **REMANDED** to the circuit court for further proceedings consistent with this opinion.

WILLIAMS, C.J., and GEATHERS, J., concur.

All Citations

--- S.E.2d ----, 2025 WL 2655752

Footnotes

1 This appears to be a reference to a line in the August 15, 2005 letter stating that "workers' compensation liabilities asserted against [WestPoint Stevens] were not liabilities assumed by" the purchase of WestPoint Stevens's assets in the bankruptcy case.

2 We decline to consider the Commission's argument that WestPoint is essentially asserting that it "breached an implied contract created by the MOU" and breach of contract actions have a three-year statute of limitations. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (explaining that a respondent is not required "to present an issue to the lower court in order to raise it as an additional sustaining ground," but an appellate court is unlikely to rely on such a ground); *id.* ("Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.").

3 Interestingly, the circuit court repeatedly referred to section 42-11-70 as a statute of repose in its written order, although it ultimately determined it did not bar recovery for occupational disease claims.

4 Although not binding authority, we find it persuasive that the Appellate Panel of the Commission has interpreted section 42-11-70 similarly in other cases. *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 149, 694 S.E.2d 525, 530 (2010) ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons ...."); *see also, e.g.*, *Bethea v. City of Myrtle Beach*, No. 1802724, 2019 WL 7424840, at *12 (S.C. Work. Comp. Comm. June 13, 2019) (denying benefits because the medical evidence showed Bethea did not contract lung cancer within two years of his last exposure to the hazards peculiar to his employment); *Truax v. Daniel Constr.*, No. 0411701, 2009 WL 1433538, at *3 (S.C. Work. Comp. Comm. Mar. 27, 2009) (denying compensation for asbestosis when there was a thirty-two year gap between Truax's last exposure and the date he became disabled because section 42-11-70 "is abundantly clear in its intent to disallow compensation for disability or death for an occupational disease of a pulmonary nature that is not contracted within two years of the date of the last injurious exposure"); *Bishop v. Westinghouse Elec. Corp.*, No. 0318085, 2007 WL 904837, at *9 (S.C. Work. Comp. Comm. Jan. 26, 2007) ("The language references two distinct events: (1) exposure and (2) contracting the occupational disease. Since exposure and contracting the disease are distinct, and not the same, an ordinary and unambiguous meaning should be assigned to the word contracting, i.e.[,] when the disease manifests itself and/or disables the claimant. The legislature chose to make compensability dependent on [there] being less than one (or two) year(s) between exposure and contraction of the disease."); *Gibson v. Westinghouse Elec. Corp.*, No. 0319071, 2007 WL 869985, at *8 (S.C. Work. Comp. Comm. Jan. 24, 2007) ("The Appellate Review Panel finds that the purpose of [section] 42-11-70 is to protect the employer against claims too old to be fairly investigated and defended. Accordingly[,] this statute should be read to effectuate the legislative intent to reasonably limit an employer's period of potential liability for workers' compensation benefits."); *Rumsey v. Daniel Int'l. Corp.*, No. 0011205, 2003 WL 22380606, at *10 (S.C. Work. Comp. Comm. Feb. 12, 2003) (" '[C]ontracted' cannot mean when the disease is 'definitively diagnosed' because that definition would render meaningless the distinction between [section] 42-11-70 and the statute of limitations provision in [section] 42-15-40, such that the time for filing a claim under [section] 42-15-40 would immediately begin to run in *every* situation upon the instant the disease was 'contracted' under [section] 42-11-70 ...."). *But see* *Bowers v. Sea Island Staffing*, No. 0226915, 2009 WL 1425599, at *4-5 (S.C. Work. Comp. Comm. Feb. 26, 2009) (awarding compensation to claimant who retired in 1994 and was diagnosed with asbestosis in 2002, after "an exposure in the 1980's or 1970's"); *Powell v. Yeargin Constr. Co.*, No. 0617676, 2008 WL 5066354, at *2 (S.C. Work. Comp. Comm. Oct. 29, 2008) (awarding total disability to employee who was diagnosed with mesothelioma in 2006 and whose last exposure occurred in 1983).