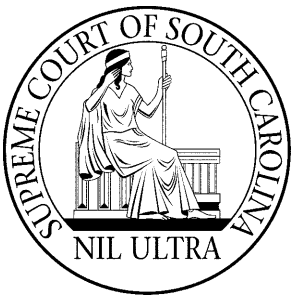

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11
March 6, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS AND ORDERS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

5070-Lincoln General v. Progressive Northern	Pending
5074-J. Kevin Baugh, M.D. v. Columbia Heart Clinic	Pending
5078-In re: Estate of Atn Burns Livingston	Pending
5082-Thomas Lee Brown v. Peoplease Corporation et al.	Pending
2012-UP-399-Bowen v. S.C. Department of Motor Vehicles	Pending
2012-UP-520-Johnson v. Mew	Pending
2012-UP-526-State v. Christopher Ryan Whitehead	Pending
2012-UP-609-Coghlan v. Coghlan	Pending
2012-UP-614 - Charles Griggs v. Ashleytowne Development	Pending
2012-UP-623-L. Paul Trask v. S.C. Department of Public Safety et al.	Pending
2012-UP-626-Maurice Morant v. SCDC	Pending
2012-UP-632-State v. Stevie Lamont Aiken	Pending
2012-UP-670-Burgess v. Burgess	Pending
2012-UP-674-SCDSS v. Devin B, Brian G., and Sue G.	Pending
2012-UP-676-G. Gottschlich v. D. McNeil	Pending
2012-UP-678-State v. Darrin D. Holston	Pending
2012-UP-688-L. Brown v. Dick Smith Nissan	Pending
2013-UP-001-R. Coleman v. State	Pending
2013-UP-010-N. Mitchell v. Juan P. Marruffo et al.	Pending
2013-UP-014-D. Keller v. ING Financial Partners et al.	Pending
2013-UP-034-Clark D. Thomas v. Bolus & Bolus	Pending
2013-UP-056-William Lippincott v. S.C. Dept. of Employment	Pending

2013-UP-057-Progressive Home Builders v. Grace Hucks Pending

2013-UP-058-State v. Bobby J. Barton Pending

2013-UP-061-State v. Christopher M. Stephens Pending

2012-UP-066-Carpenter v. Measter Pending

2013-UP-070-Loretta Springs v. Clemson University Pending

2013-UP-072-Thomas Dewey Wise v. SCDHEC Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4670-SCDC v. B. Cartrette Pending

4750-Cullen v. McNeal Pending

4764-Walterboro Hospital v. Meacher Pending

4779-AJG Holdings v. Dunn Pending

4819-Columbia/CSA v. SC Medical Pending

4832-Crystal Pines v. Phillips Pending

4833-State v. L. Phillips Pending

4839-Raquel Martinez v. Spartanburg County, Employer, et al. Granted 02/07/13

4851-Davis v. KB Home of S.C. Pending

4859-State v. B. Garris Pending

4862-5 Star v. Ford Motor Company Pending

4863-White Oak v. Lexington Insurance Pending

4865-Shatto v. McLeod Regional Medical Pending

4867-State v. Jonathan Hill Pending

4872-State v. Kenneth Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4879-Stephen Wise v. Richard Wise	Pending
4880-Gordon v. Busbee	Pending
4887-Rebecca West v. Todd Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4890-Potter v. Spartanburg School	Pending
4892-Katie Green Buist v. Michael Scott Buist	Pending
4894-State v. Andre Jackson	Pending
4895-King v. International Knife	Pending
4898-Purser v. Owens	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Patricia Lewin v. Albert Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree Electrical	Pending
4924-State v. Bradley Senter	Pending
4926-Dinkins v. Lowe's Home Centers	Pending

4927-State v. John Porter Johnson	Pending
4932-Margie Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending
4934-State v. Rodney Galimore	Pending
4936-Mullarkey v. Mullarkey	Pending
4940-York Cty. and Nazareth Church v. SCHEC et al	Pending
4941-State v. Bentley Collins	Pending
4947-Ferguson Fire and Fabrication v. Preferred Fire Protection	Pending
4949-Robert Crossland v. Shirley Crossland	Pending
4953-Carmax Auto Superstores v. S.C. Dep't of Revenue	Pending
4954-North Point Dev. Group v. SCDOT	Pending
4956-State v. Diamon D. Fripp	Pending
4960-Justin O'Toole Lucey et al. v. Amy Meyer	Pending
4964-State v. Alfred Adams	Pending
4973-Byrd v. Livingston	Pending
4975-Greeneagle Inc. v. SCDHEC	Pending
4979-Major v. City of Hartsville	Pending
4983-State v. James Ervin Ramsey	Pending
4989-Dennis N. Lambries v. Saluda County Council et al.	Pending
4992-Gregory Ford v. Beaufort County Assessor	Pending
4995-Keeter v. Alpine Towers International and Sexton	Pending

4997-Allegro v. Emmett J. Scully	Pending
5001-State v. Alonzo Craig Hawes	Pending
5003-Earl Phillips as personal representative v. Brigitte Quick	Pending
5006-J. Broach and M. Loomis v. E. Carter et al.	Pending
5010-S.C. Dep't of Transportation v. Janell P. Revels et al.	Pending
5011-SCDHEC v. Ann Dreher	Pending
5013-Geneva Watson v. Xtra Mile Driver Training	Pending
5017-State v. Christopher Manning	Pending
5019-John Christopher Johnson v. Reginald C. Lloyd et al.	Pending
5020-Ricky Rhame v. Charleston Cty. School District	Pending
5022-Gregory Collins v. Seko Charlotte and Nationwide Mutual	Pending
5025-State v. Randy Vickery	Pending
5031-State v. Demetrius Price	Pending
5032-LeAndra Lewis v. L.B. Dynasty	Pending
5034-State v. Richard Bill Niles, Jr.	Pending
5035-David R. Martin and Patricia F. Martin v. Ann P. Bay et al.	Pending
5041-Carolina First Bank v. BADD	Pending
5044-State v. Gene Howard Vinson	Pending
5052-State v. Michael Donahue	Pending
5059-Kellie N. Burnette v. City of Greenville et al.	Pending
2010-UP-356-State v. Darian K. Robinson	Pending

2011-UP-038-Dunson v, Alex Lee, Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-127-State v. Beulah Butler	Pending
2011-UP-199-Amy Davidson v. City of Beaufort	Pending
2011-UP-328-Davison v. Scaffe	Pending
2011-UP-343-State v. Eric Dantzler	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. Lloyd Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending
2011-UP-385-State v. Anthony Wilder	Pending
2011-UP-400-McKinnedy v. SCDC	Pending
2011-UP-447-Brad Johnson v. Lewis Hall	Pending
2011-UP-456-Thomas Heaton v. State	Pending
2011-UP-468-Patricia Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. Terrell McCoy	Pending
2011-UP-475-State v. James Austin	Pending
2011-UP-495-State v. Arthur Rivers	Pending

2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Heath Hill v. SCDHEC and SCE&G	Pending
2011-UP-516-Vaughn Smith v. SCDPPPS	Pending
2011-UP-517-N. M. McLean et al. v. James B. Drennan, III	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending
2011-UP-522-State v. Michael D. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-558-State v. Tawanda Williams	Pending
2011-UP-562-State v. Tarus Henry	Pending
2011-UP-572-State v. Reico Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. David Lee Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-A. Leon Ravenell v. Nancy Meyer	Pending
2012-UP-010-State v. Norman Mitchell	Pending
2012-UP-014-State v. Andre Norris	Pending
2012-UP-018-State v. Robert Phipps	Pending
2012-UP-030-Babaee v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. Andra Byron Jamison	Pending
2012-UP-060-Austin v. Stone	Pending

2012-UP-081-Hueble v. Vaughn	Pending
2012-UP-089-State v. A. Williamson	Pending
2012-UP-091-State v. Mike Salley	Pending
2012-UP-152-State v. Kevin Shane Epting	Pending
2012-UP-153-McCall v. Sandvik, Inc.	Pending
2012-UP-203-State v. Dominic Leggette	Pending
2012-UP-217-Forest Beach Owners' Assoc. v. C. Bair	Pending
2012-UP-218-State v. Adrian Eaglin	Pending
2012-UP-219-Dale Hill et al. v. Deertrack Golf and Country Club	Pending
2012-UP-267-State v. James Craig White	Pending
2012-UP-270-National Grange Ins. Co. v. Phoenix Contract Glass, LLC, et al.	Pending
2012-UP-274-Passaloukas v. Bensch	Pending
2012-UP-276-Regions Bank v. Stonebridge Development et al.	Pending
2012-UP-278-State v. Hazard Cameron	Pending
2012-UP-285-State v. Jacob M. Breda	Pending
2012-UP-286-Diane K. Rainwater v. Fred A. Rainwater	Pending
2012-UP-290-State v. Eddie Simmons	Pending
2012-UP-292-Demetrius Ladson v. Harvest Hope	Pending
2012-UP-293-Clegg v. Lambrecht	Pending
2012-UP-302-Maple v. Heritage Healthcare	Pending
2012-UP-312-State v. Edward Twyman	Pending

2012-UP-314-Grand Bees Development v. SCDHEC et al.	Pending
2012-UP-321-James Tinsley v. State	Pending
2012-UP-330-State v. Doyle Marion Garrett	Pending
2012-UP-348-State v. Jack Harrison, Jr.	Pending
2012-UP-351-State v. Kevin J. Gilliard	Pending
2012-UP-365-Patricia E. King and Robbie King Jones, as representatives of W.R. King and Ellen King v. Margie B. King and Robbie Ione King, individually and as co-representatives of the estate of Christopher G. King et al.	Pending
2012-UP-371-State v. Thomas Smart	Pending
2012-UP-404-McDonnell and Assoc v. First Citizens Bank	Pending
2012-UP-432-State v. Bryant Kinloch	Pending
2012-UP-433-Jeffrey D. Allen v. S.C. Budget and Control Bd. Employee Insurance Plan et al.	Pending
2012-UP-460-Figueroa v. CBI/Columbia Place Mall et al.	Pending
2012-UP-462-J. Tennant v. Board of Zoning Appeals	Pending
2012-UP-471-SCDSS v. Kelcie C. et al.	Pending
2012-UP-502-Hurst v. Board of Dentistry	Pending
2012-UP-504-Palmetto Bank v. Cardwell	Pending
2012-UP-552-Virginia A. Miles v. Waffle House	Pending
2012-UP-559-NAFH National Bank v. Israel Romero	Pending
2012-UP-561-State v. Joseph Lathan Kelly	Pending
2012-UP-569-Vennie Taylor Hudson v. Caregivers of SC	Pending

2012-UP-577-State v. Marcus Addison	Pending
2012-UP-579-Andrea Beth Campbell v. Ronnie A. Brockway	Pending
2012-UP-585-State v. Rushan Counts	Pending
2012-UP-600-Karen Irby v. Augusta Lawson	Pending
2012-UP-603-Fidelity Bank v. Cox Investment Group et al.	Pending
2012-UP-608-SunTrust Mortgage v. Ostendorff	Pending
2012-UP-616-State v. Jamel Dwayne Good	Pending
2012-UP-658-Palmetto Citizens v. Butch Johnson	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Clifton Sparks, Petitioner,

v.

Palmetto Hardwood, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Respondents.

Appellate Case No. 2011-186526

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27229
Heard December 4, 2012 – Filed March 6, 2013

AFFIRMED

Edward L. Graham, of Graham Law Firm, PA, of Florence, for Petitioner.

Weston Adams III and M. McMullen Taylor, of McAngus Goudelock & Courie, LLC, both of Columbia, and Helen Faith Hiser, of McAngus Goudelock & Courie, LLC, of Mt. Pleasant, for Respondent.

JUSTICE PLEICONES: This Court granted certiorari to review the Court of Appeals' decision in *Clifton Sparks v. Palmetto Hardwood, Inc., and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates*, Op. No. 2010-UP-525 (S.C. Ct. App. filed Dec. 13, 2010), affirming the decision and order of the South Carolina Workers' Compensation Commission (the Commission)[1] awarding Clifton Sparks (Petitioner) five hundred weeks of compensation for total and permanent disability but denying him lifetime benefits because he did not suffer "physical brain damage" within the meaning of S.C. Code Ann. § 42-9-10(C) (Supp. 2011) as a result of a compensable injury. We affirm.

FACTS

Palmetto Hardwood, Inc., employed Petitioner as a saw operator. Petitioner suffered three work-related injuries during this employment, the first two of which injured Petitioner's lower back. In the third incident, Petitioner was required to remove a piece of metal from under a gang saw. In the process, the metal exploded and a three- to four-inch cubic piece struck him in the head.

Petitioner subsequently sought workers' compensation for his injuries. At the hearing, Petitioner testified to substantial head pain, loss of cognitive ability, and other brain-function-related symptoms, including inability to read without severe headache, loss of his mathematical abilities, inability to balance while standing or to walk without a cane, hand tremors, anxiety, and more.

Six doctors opined regarding whether Petitioner had suffered a physical brain injury. Two opined that Petitioner might have suffered a mild brain injury as a result of the work accident but that any difficulties resulting from it were intermingled with other problems, including pain and psychiatric disturbances. Three opined simply that Petitioner had suffered a physical brain injury. One opined that Petitioner had suffered no physical brain injury. The Commission found that Petitioner had sustained a compensable injury to his head, including a

[1] We refer to both the Workers' Compensation Appellate Panel and the Workers' Compensation Full Commission as the Commission.

mild concussion, but that his testimony relating to the extent of his brain injury was not credible and that the evidence failed to show that Petitioner had been dazed and confused after his head injury or suffered nausea, vomiting, cognitive impairments, or post-concussive headaches. The Commission found both that Petitioner had suffered a compensable injury to his head and that "the claim for physical brain injury borders on the frivolous." It also found him to be totally and permanently disabled. The Commission ruled that Petitioner should receive only five hundred weeks of compensation as a result of his total and permanent disability and medical expenses causally related to the three compensable injuries.

On appeal, the circuit court remanded to the Commission for it (1) to explain whether the "physical brain injury" it found "border[ed] on the frivolous" was intended to be the same as or different from "physical brain damage" as used in § 42-9-10(C) and (2) to reconcile the order's seemingly contradictory findings that Petitioner suffered a compensable injury to the head with its finding of no physical brain injury.

On remand, the Commission clarified that "Claimaint has failed to carry his burden of proof to establish physical brain damage as contemplated by S.C. Code Ann. § 42-9-10. Although Finding of Fact #7 above notes an injury-by-accident to the brain, this does not constitute damage to the brain."

On appeal, the circuit court affirmed the Commission's order. Petitioner subsequently appealed to the Court of Appeals, which affirmed in an unpublished opinion. This Court granted certiorari. We now affirm.

Petitioner argues that the Court of Appeals erred when it applied an improper definition of "physical brain damage" within the meaning of § 42-9-10(C). We disagree.

DISCUSSION

The interpretation of a statute is a question of law. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). Further, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id*. at 77, 716 S.E.2d at 882. However, if the agency's

interpretation conflicts with the statute's plain language, it must be rejected. *Id*. The agency's interpretation of "physical brain damage" is clearly consonant with the intent of the General Assembly as more fully discussed below.

"The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget and Control Bd*., 310 S.C. 210, 213 (1992). "If the statute is ambiguous, . . . courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. 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." *Id*. (citation omitted).

S.C. Code Ann. § 42-9-10(C) reads as follows:

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

(Emphasis added.) At issue in this case is the term "physical brain damage." "[W]ords in a statute must be construed in context." *Southern Mut. Church Ins. Co. v. South Carolina Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). Thus, "the Court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id*.

The immediate context of the term "physical brain damage" suggests that the General Assembly intended a more restrictive meaning than the most literal interpretation as urged by Petitioner. Section 42-9-10(C) awards lifetime benefits for totally disabled claimants suffering "physical brain damage" as an exception to the normal five-hundred-week limitation along with only two other conditions: paraplegia and quadriplegia. Both of these conditions are by definition severe,

permanent physical impairments. Thus, the context implies the General Assembly meant to require severe, permanent impairment of normal brain function in order for an injured worker to be deemed physically brain damaged under § 42-9-10(C).

Moreover, within a single statutory scheme, the same word should be given consistent meaning. *Doe v. South Carolina Dept. of Health and Human Services*, 398 S.C. 62, 73 n.11, 727 S.E.2d 605, 611 n.11 (2011). Here, the General Assembly used the term "brain damage" only one other time in the workers' compensation statutes, where it is included in a list of "permanent physical impairments." S.C. Code Ann. § 42-9-400(d) (Supp. 2011). Insofar as the term "brain damage" in § 42-9-400(d) is more clearly defined than it is in § 42-9-10(C), that definition should inform our interpretation of the term "brain damage" in §42-9-10(C). We conclude, therefore, the General Assembly intended "physical brain damage" in §42-9-10(C) to have a meaning consonant with § 42-9-400(d) of permanent physical damage to the brain.

Moreover, we note that this interpretation is consistent with that of the Commission and thus affords proper deference to the agency. *CFRE, LLC, supra*.

Finally, a definition of "physical brain damage" restricting it to severe permanent damage appears to be consonant with the purpose of the workers' compensation statutes to provide only minimal compensation. *See Town of Mt. Pleasant, supra*; *Wigfall v. Tideland Utilities, Inc*., 354 S.C. 100, 115-16, 580 S.E.2d 100, 107-08 (2003) (the purpose of the workers' compensation provisions is "to provide a no-fault system focusing on quick recovery, relatively ascertainable awards and limited litigation. In exchange for these benefits, the parties and society as a whole bear some costs"; "they are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others." (citations omitted)).

Section 42-9-10(C) also requires that the injury be "physical." "Physical" means "[o]f or pertaining to the body, as distinguished from the mind or spirit; bodily" and "[o]f or pertaining to material things." *American Heritage Dictionary* 935 (2nd College Ed. 1991). Nothing in the context of the statute suggests that this word should be interpreted otherwise. We thus decline to impose a requirement that the injury be proved through an "objective diagnostic medium," since some indisputably physical injuries may not be revealed by diagnostic instruments that

can detect only relatively gross physical abnormalities. In this case, for example, there is no dispute that Petitioner suffered at least a mild concussion, by definition a physical injury to the brain.[2]

Petitioner also argues that the General Assembly's use of the verb phrase "has suffered" indicates that the injury need not result in permanent damage, since this form of the verb requires no more than that the action—here "suffered"— occur at some (indeterminate) point in the past. We disagree. The present perfect tense may signify that the action occurred in the past but has continuing effects in the present, began in the past and continues into the present or is completed in the present, or is completed at the present time. *See Commonwealth v. U.S. E.P.A.*, No. 96-4274, slip op. at 3 (6th Cir. Sept. 2, 1998), *In re Gwynne P*., 215 Ill.2d 340, 357-58 (Ill. 2005); *Schieffelin & Co. v. Dep't of Liquor Control*, 194 A.2d 1191, 1197 (Conn. 1984); *In re A.H.B., M.L.B., J.J.B.*, 791 N.W.2d 687, 689 (Iowa 2010); *American Heritage Dictionary* 980 (2d College Ed. 1991). The General Assembly's use of this tense is consistent with a finding that it intended "physical brain damage" to denote damage that is permanent and therefore necessarily continues to have effect into the present.

Thus, we conclude that "physical brain damage" as used in § 42-9-10(C) is physical brain damage that is both permanent and severe.

As to Petitioner's remaining issues, we find substantial evidence in the record to support the Commission's decision. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135-36, 276 S.E.2d 304, 306-07 (1981); *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) ("The final determination of witness credibility and the weight to be accorded evidence is reserved to the . . . Commission."); *Pearson v. JPS Converter & Indus. Corp*., 327 S.C. 393, 400, 489 S.E.2d 219, 222 (Ct. App. 1997) (§ 42-9-10 does not require that total and permanent disability result solely from physical brain damage but does require that the claimant suffer physical brain damage as a result of the compensable injury); *City of North Myrtle Beach v. East*

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[2] A "concussion" is defined on a National Institutes of Health webpage as "a minor traumatic brain injury (TBI) that may occur when the head hits an object, or a moving object strikes the head." www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001802/.

Cherry Grove Realty Co., LLC, 397 S.C. 497, 503, 725 S.E.2d 676, 679 (2012) ("As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself.").

CONCLUSION

Because "physical brain damage" as contemplated in S.C. Code Ann. § 42-9-10 requires severe and permanent physical brain damage as a result of a compensable injury and the Workers' Compensation Commission's finding that Petitioner did not suffer such brain damage is supported by substantial evidence in the record, the judgment of the Court of Appeals is

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Michael D. Crisp, Jr., Employee, Petitioner,

v.

SouthCo., Inc., Employer, and Pennsylvania National Mutual Casualty Insurance Co., Carrier, Respondents.

Appellate Case No. 2010-180906

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27230
Heard October 2, 2012 – Filed March 6, 2013

REVERSED

Kathryn Williams, of Greenville, for Petitioner.

Vernon F. Dunbar, of Turner Padget Graham & Laney, P.A., of Greenville, and Carmelo Barone Sammataro, of Turner Padget Graham and Laney, P.A., of Columbia, for Respondents.

CHIEF JUSTICE TOAL: Michael D. Crisp (Petitioner) petitioned this Court for a writ of certiorari to review the court of appeals' decision reversing the circuit court's finding that the Appellate Panel of the Workers' Compensation Commission

(the Commission) erroneously determined that Petitioner suffered a compensable brain injury and physical brain damage as a result of an injury by accident while working for Respondent SouthCo., Incorporated (Employer). We reverse the decision of the court of appeals, and remand this action to the Commission for further consideration of whether Petitioner sustained physical brain damage, as contemplated under section 42-9-10(c) of the Workers' Compensation Act (the Act), which would entitle him to benefits for life.

FACTS/PROCEDURAL BACKGROUND

Petitioner[1] worked for Employer hydra-seeding grass and performing odd construction jobs. On March 10, 2004, Petitioner and other workers were installing silt fencing to combat ground erosion. This task involved installing fence poles into the ground using the bucket of a Bobcat earthmover. On this particular day, Petitioner was holding a pole while another worker operated the Bobcat. As Petitioner bent down to reach for a pole, the bucket of the Bobcat fell on Petitioner, covering him.[2] Petitioner stated he remembered running towards a truck at the jobsite, noticing that his right hand was broken and bleeding. Petitioner's co-workers also alerted him to a gash on the back of his head that was also bleeding. Petitioner was taken to the emergency room.

At the emergency room, Petitioner was treated for abrasions and bruises to the back of the head and neck and a complex fracture in his right hand. There is no mention of a brain injury in Petitioner's hospital records.

Petitioner required surgery to his right hand. Orthopedist James Essman performed the surgery and continued to treat Petitioner's hand injury. Dr. Essman's notes do not reflect any post-operative complaints regarding any brain injury or symptoms.[3]

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[1] Petitioner formally completed seventh grade and received his G.E.D. Since completing his schooling, Petitioner has performed general labor jobs.

[2] The bucket of the Bobcat was fabricated out of solid steel and weighed approximately 600 pounds.

[3] Dr. Essman ultimately declared that Petitioner reached Maximum Medical Improvement (MMI) with respect to his hand on September 16, 2004. *See*

On March 23, 2004, Petitioner was treated for back pain, neck pain, and nausea by his family doctor, Dr. Hunter Leigh. Dr. Leigh noted that Petitioner complained of "headaches." On April 16, 2004, Dr. John Klekamp, an orthopedic surgeon, also evaluated Petitioner and diagnosed him with cervical strain, lumbar strain, and a fracture of the right hand. At his appointment on June 6, 2004, Dr. Klekamp noted that Petitioner was "neurologically intact," but, in his notes following a July 7, 2004, appointment, stated Petitioner still suffered from "intermittent headaches."

On August 12, September 2, and September 23, 2004, Dr. Kevin Kopera, a physician with the Center for Health and Occupational Evaluation, evaluated Petitioner and diagnosed him with chronic cervical strain, chronic lumbar strain, and a broken right hand. During the course of his evaluation, Dr. Kopera noted that Petitioner had "no cognitive deficits." However, after treating him on September 23, 2004, Dr. Kopera noted,

> One issue raised was [Petitioner] continues to have headaches . . . . [Petitioner's] wife questioned why he has not undergone MRI imaging of his head due to his persistent headaches. He did sustain a blow to the head in terms of his work injury and I guess this was not considered by prior evaluating physicians and we discussed this at some length today.

Therefore, Dr. Kopera diagnosed Petitioner with chronic cervical strain, chronic lumbar strain, and chronic headaches. In addition, Dr. Kopera stated "[Petitioner] appears neurologically intact but due to his persistent headaches it may be prudent to obtain an MRI scan of the brain to complete a thorough evaluation." The MRI scan of Petitioner's brain showed no abnormalities. After completing a Functional Capacity Evaluation, Dr. Kopera released Petitioner to return to work with restrictions, and noted Petitioner "report[ed] feeling depressed related to his current condition and this will take some adjustment."[4]

O'Banner v. Westinghouse Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995) ("[MMI] is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment that will lessen the impairment.").

On April 12–13, 2005, Dr. Moss, a clinical psychologist, performed a neuropsychological evaluation on Petitioner at the request of Petitioner's attorney. Dr. Moss noted:

> On the basis of the current examination, there are clear indications of deficits in verbal memory, attention, problem solving, and inhibition tied to his work injury. There are indications that he has likely experienced personality changes as a result of his injury . . . [Petitioner] is experiencing psychological distress from his injuries as well. The exacerbation of obsessive-compulsive tendencies can also be associated with brain injuries involving the orbito-frontal area. This is often affected in head injury cases due to the irregular shape of the skull and olfaction is often affected since the olfactory bulbs are there. The current findings would be consistent with a frontal lobe injury.

Based on his examination, Dr. Moss diagnosed Petitioner with Cognitive Disorder [not otherwise specified], probable personality change due to head injury, obsessive compulsive disorder, traumatic brain injury, and poly-substance abuse[5] in full sustained remission. Dr. Moss further opined that Petitioner could benefit from a brain injury program.

On May 24, 2006, Dr. Thomas Collings, a neurologist, conducted an independent medical evaluation on Petitioner. Dr. Collings diagnosed Petitioner with a traumatic brain injury/closed head injury, defining a closed head injury as "trauma to the brain in a global way as opposed to . . . a focal area of the brain . . . caus[ing] symptoms in . . . higher competent motions." Based on his in-office

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[4] During this time period, Petitioner also attended regular physical therapy sessions to rehabilitate his injuries. On August 24, 2004, Petitioner's physical therapy intake sheet notes "severe headaches." On September 22, 2004, Petitioner's physical therapist noted that Petitioner reported headaches three times per week. On October 4, 2004, the physical therapist's notes indicate that Petitioner's headaches were "still bad."

[5] Petitioner has an extensive history of narcotic drug and alcohol abuse and was addicted to marijuana, cocaine, crystal meth, heroine, and LSD before achieving sobriety in 2003.

examination of Petitioner, Dr. Collings expressed some reservation with regard to his diagnosis, but he stated that the neuropsychological examination was the "best information to support that there's . . . significant change between this pre-and-post condition," as it was a better indicator of brain injury than his office examination. Dr. Collings also expressed some hesitation in his diagnosis with respect to Petitioner's headaches, testifying that he would have difficulty finding any evidence to support a finding of physical brain injury had he not relied on Dr. Moss's findings. However, Dr. Collings ultimately concluded that Petitioner sustained a brain injury.

On November 15 and 28, 2005, Dr. David Price, a clinical psychologist, conducted a neuropsychological evaluation on Petitioner at the request of defense counsel. Dr. Price opined that Petitioner did not sustain a traumatic brain injury nor was there any objective medical evidence of a brain abnormality, such as an abnormal CT scan, MRI, or EEG. Dr. Price diagnosed Petitioner with pain disorder associated with psychological factors and a general medical condition, adjustment disorder with depressed mood, obsessive compulsive disorder, antisocial personality disorder, partner relational problem, and phase of life problem.

On March 6, 2006, nearly two years after his injury, Dr. Moss opined that Petitioner "sustained physical brain damage as a result of his work injury of [sic] March 10, 2004."

At his deposition, Petitioner testified he began experiencing problems with his memory and difficulties mentally processing information, concentrating on more than one task, and keeping up with daily tasks in January 2005.[6] Petitioner testified he desired to receive further treatment to "learn to cope with the ability to multitask and to remember things and stay focused." Furthermore, Petitioner testified he suffered from depression since the accident, and he desired to receive treatment for this condition, as well. Petitioner testified he had not been able to obtain employment since the accident.

[6] Up until this time, Petitioner testified his wife "had . . . been doing everything for [him]," so he did not notice these symptoms prior to January 2005 around the time they separated.

A hearing was convened before the Workers' Compensation Hearing Commissioner (the Single Commissioner) on March 22, 2006. At the hearing, Petitioner claimed he sustained injuries to his head, brain, neck, back, right upper extremity, and psyche as a result of the accident and sought continued temporary compensation benefits and continued medical treatment, including treatment in a traumatic brain injury program, and in the alternative, sought a finding that he was permanently and totally disabled and entitled to lifetime compensation benefits due to "physical brain damage." Respondents conceded Petitioner sustained compensable injuries to his neck, back, and right upper extremity, but denied he sustained a brain injury and physical brain damage as a consequence of the work-related incident. Respondents further argued that Petitioner reached MMI on November 1, 2004, and sought a determination of permanent disability and credit for alleged overpayment of temporary disability compensation benefits.

By order dated August 1, 2006, the Single Commissioner found as fact, *inter alia*: (1) that approximately one year after the incident, Dr. Moss evaluated Petitioner and, using objective neuropsychological testing revealing cognitive deficits, diagnosed Petitioner with Cognitive Disorder [not otherwise specified], polysubstance abuse in full sustained remission, probable personality change due to head injury, exacerbated obsessive-compulsive disorder, traumatic brain injury, and "*physical brain damage*"; (2) that Dr. Collings's expert opinion was credible, including his testimony that he never saw an MRI or CT scan of Petitioner's brain, that cognitive problems usually start immediately after the injury, that the fact that Petitioner did not lose consciousness signified that his head trauma was likely less serious, that he would expect Petitioner to complain of headaches and seek medical intervention for those headaches soon after the accident if they had been severe, that no objective tests suggested Petitioner had a "*physical brain injury*," and that none of the attending physicians mentioned any brain injury symptoms, nor referred Petitioner for further testing; (3) that, based on the opinions of Dr. Moss and Dr. Collings, Petitioner sustained a head injury resulting in cognitive disorders to his brain, but did not sustain a "*physical brain injury*"; (4) that Petitioner sustained compensable head, psychological, and neuropsychological injuries; (5) that Dr. Collings and Dr. Moss opined that Petitioner needed additional psychological and neuropsychological evaluation and treatment, including, but not limited to, evaluation and treatment in a brain injury center; (6) that Petitioner was unable to work and temporarily totally disabled because of his injuries, including his psychological and head injuries, and remained unable to work and temporarily totally disabled because of his psychological and head injuries; (7) that, based on

the opinions of Dr. Moss and Dr. Collings, Petitioner had not reached MMI for his head and psychological injuries; and (8) that the determination of Petitioner's permanent disability because of his injury by accident was premature. (emphasis added).

Consequently, the Single Commissioner determined, as a matter of law, that Petitioner sustained an injury by accident causing compensable injuries to his neck, back, right upper extremity, and head, causing compensable psychological and neuropsychological injuries, and causing compensable cognitive disorders, and Petitioner reached MMI from his right upper extremity, neck, and back injuries, but not from his head and psychological injuries. Thus, the Single Commissioner found Respondents were responsible

> for all causally related medical treatment and expenses from March 10, 2004 to the present and continuing, including but not limited to causally related medical, psychological, and neuropsychological evaluation and treatment for [Petitioner's] physical, psychological, and neuropsychological injuries, evaluation and treatment for claimant's physical, psychological, and neuropsychological injuries, evaluation and treatment in a brain injury center, and necessary medications[,]

and ordered Respondents to pay Petitioner "temporary total disability compensation benefits from March 10, 2004 and continuing until further Order of the Commission or agreement of the parties."

Pursuant to its statutory authority, the Commission reviewed the Single Commissioner's order. *See* S.C. Code Ann. § 42-17-50 (Supp. 2011) (providing that "the Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[]"). The Commission unanimously affirmed the Single Commissioner's order with respect to all of the findings of fact and conclusions of law contained therein and incorporated the Single Commissioner's entire order by reference.

On appeal, the circuit court[7] reversed the Commission, finding that the Commission's order was "internally inconsistent" and "the only conclusion that can be reached on this record is that [Petitioner] has sustained *physical brain damage* as a result of his injury by accident." (emphasis added). More specifically, the circuit court stated:

> Despite finding Dr. Moss credible, adopting the findings of brain injury related symptoms and conditions that he used to diagnose frontal lobe brain injury and physical brain damage, and awarding treatment in a "brain injury program" he recommended[,] the Commission determined that [Petitioner] had not sustained physical brain injury. That conclusion contradicts the Commission's findings of brain injury related conditions, such as Cognitive Disorder [not otherwise specified], and is clearly erroneous. The Commission rejected the other expert's report, so there is no other credible evidence in the record on which the Commission can base its findings that claimant did not sustain *physical brain damage*.

(emphasis added). Based on the foregoing, the circuit court concluded that the Commission's finding in contravention of these facts was "erroneous" and was "not supported by the evidence" and found, as a matter of law, that Petitioner "sustained *physical brain damage* within in the meaning of the Act." (emphasis added).

Respondents appealed. *See Crisp v. SouthCo., Inc.*, 390 S.C. 340, 701 S.E.2d 762 (Ct. App. 2010). In contrast to the circuit court, the court of appeals found that the Record was "replete with substantial evidence to support the Commission's finding that [Petitioner] did not sustain a *physical brain injury* based on Dr. Collings' testimony and the medical records of Crisp's physicians." *Id.* at 344–45, 701 S.E.2d at 765 (emphasis added). The court of appeals pointed to the following evidence in the Record to justify upholding the Commission's decision on substantial evidence grounds: (1) the medical records of the physicians who treated Petitioner in the hospital immediately following the accident did not mention any symptoms normally associated with a "*physical brain injury*"; (2) the physicians attending Petitioner following the surgery on his hand did not diagnose

[7] Because Petitioner's injuries occurred prior to July 1, 2007, the Commission's decision was subject to review by the circuit court sitting in its appellate capacity.

a "*physical brain injury*"; (3) the MRI scan conducted by Dr. Kopera did not identify any brain abnormalities indicative of a "*physical brain injury*," instead suggesting Petitioner's brain was neurologically intact; (4) and Dr. Collings's testimony at the hearing before the Single Commissioner that Petitioner's injury was not typical of a brain injury,[8] that Petitioner's headaches were not typical in character and severity to those suffered when a significant brain injury occurs and his conclusion that he would have "great difficulty" in diagnosing Petitioner with a "*physical brain injury*" entitling Petitioner to a lifetime of benefits absent Dr. Moss's report and a vocational evaluation stating Petitioner was not employable. *Id.* at 345–46, 701 S.E.2d at 765–66.

On appeal to this Court, Petitioner contends the court of appeals erred in finding the Commission's decision that Petitioner "has not sustained *physical brain damage*" was supported by substantial evidence in the Record, erred in finding that substantial evidence supported the Commission's findings where the findings were contradictory, and erred in upholding the Commission's decision because the only conclusion that could be reached on the evidence was that Petitioner sustained "*physical brain damage*" within the meaning of the Act. (emphasis added).

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[8] More specifically, the court of appeals relied on the following testimony from Dr. Collings concerning Petitioner's diagnosis:

> What's missing to me and what was missing when I examined him myself and tried to elicit this history is he doesn't seem to recall being hit in the head. He wasn't complaining of head trauma or pain at the time. He was not aware that he had a cut on the head. It was only when someone else was pointing out to him and he was not immediately but very briefly able to get up and run after the accident and was concerned about his hands. All of those things stand in contrast to someone who should've had a significant head injury, closed head injury, they're knocked out. They're unconscious for a period of time and then they're confused when they wake up from that and they're often unable to get up and would be ataxic or have [no] control of their balance and so forth. All of these things are lacking in that report. Did he have a head injury? Yes, he had some type of head injury but it appears from the records to be very minor.

Crisp, 390 S.C. at 345–46, 701 S.E.2d at 765.

We granted certiorari to review the court of appeals' decision pursuant to Rule 242, SCACR.

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) "governs appellate review of a final decision from an administrative agency." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 427, 645 S.E.2d 424, 428 (2007) (citation omitted); *see* S.C. Code Ann. §§1-23-310, et seq. (Supp. 2011). Under the APA, this Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(5); *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (the Commission is tasked with finding facts, evaluating the credibility of the witnesses, and assigning weight to the evidence). However,

> [t]he court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(5)(a)–(f).

ANALYSIS

We agree with Petitioner that the court of appeals erred in upholding the Commission's decision, albeit not for any of the reasons propounded by Petitioner.

Notably, the Commission did not resolve the permanent status of Petitioner's brain injuries. Rather, the Commission's order manifests a clear intention to delay a permanency finding with respect to Petitioner's brain injury because Petitioner had not yet reached MMI, and therefore, the Commission ordered further testing and treatment to be paid for by Respondents, including but not limited to treatment in a brain injury trauma center, and directed Respondents to continue to pay temporary total disability compensation "until further [o]rder of the Commission or agreement of the parties." In the substance of the order, however, the Commission found that Petitioner sustained a traumatic closed head injury as a result of an injury by accident and that the head injury caused compensable neuropsychological injuries and cognitive disorders, yet the Commission further found that Petitioner did not sustain a "physical brain injury."

From this inartful phrasing onward, the circuit court, the court of appeals, and the parties in their arguments to the various tribunals and in their briefs have alternatively referred to Petitioner's brain injuries in terms of "physical brain injury" and "physical brain damage," despite the marked difference in the length of time compensation may be awarded when the injury is "physical brain damage" contemplated under section 42-9-10(C) of the South Carolina Code.

Petitioner now contends that, because all of the probative expert evidence contained in the Record proves Petitioner sustained a brain injury and physical brain damage within the meaning of the Act and the Commission made a direct finding on that point, the only conclusion this Court may reach on this Record is that Petitioner suffered "physical brain damage." Thus, Respondents argue "[t]he critical issue in this case is whether the Commission correctly concluded that [Petitioner] is not entitled to lifetime benefits for a physical brain injury that no objective medical evidence supports," and the court of appeals did not err in reversing the circuit court because the Record is replete with evidence supporting the Commission's finding that Petitioner did not sustain "physical brain damage" as contemplated by section 42-9-10(C).

These arguments were prematurely before the circuit court, court of appeals, and now this Court, as the Commission explicitly left the determination of permanency to a later date. However, we clarify, *infra*, what is meant by "physical brain damage" under section 42-9-10(C) for guidance on remand.

Pursuant to section 42-1-160(A) of the South Carolina Code, for an injury to be compensable under the Act, it must be "an injury by accident" and "aris[e] out of and in the course of employment." *See* S.C. Code Ann. § 42-1-160(A) (Supp. 2011). To this end, "[a]n injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996) (citation omitted). "Whether there is any causal connection between employment and an injury is a question of fact for the Commission." *Hill*, 373 S.C. at 431, 645 S.E.2d at 436 (citation omitted). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) (citation omitted).

In general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks. *See* S.C. Code Ann. § 42-9-10(A) (Supp. 2011); S.C. Code Ann. Reg. § 67-1101 (Supp. 2011). However,

> Notwithstanding the five-hundred-week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, *or who has suffered physical brain damage* is not subject to the five-hundred-week limitation and shall receive the benefits for life.

Id. § 42-9-10(C) (Supp. 2011) (emphasis added).

Petitioner argues that the mere presence of any physical brain injury or damage, regardless of degree, triggers the operation of section 42-9-10(C). This argument is not persuasive, as it is contrary to legislative intent and to the manner in which our courts have awarded compensation for injuries to the brain.

As we found in *Sparks v. Palmetto Hardwood, Incorporated*, Op. No. 27229 (S.C. Sup. Ct. filed March 6, 2013) (Shearouse Adv. Sh. No. 11 at 14), we view the inclusion of "physical brain damage," along with quadriplegia and paraplegia, in section 42-9-10(C) as indicative of the General Assembly's intent to compensate an employee-claimant for life only in the most serious cases of injury to the brain, separate and apart from other scheduled injuries, resulting in permanent physical brain damage.

As noted in *Sparks*, permanency and physicality are requirements. However, the severity of the injury is the lynchpin of the analysis. *Cf. James v. Anne's Inc.*, 390 S.C. 188, 199, 701 S.E.2d 730, 736 (2010) ("The 500 weeks limitation, however, represents the limit of the *monetary* amount of compensation that may be recovered. It has no relation to the duration or the extent of the injury. A permanent impairment, by definition, lasts for a lifetime. (emphasis in original)).

Inherent in the requirement that the injury to the brain be severe is the requirement that the worker is unable to return to suitable gainful employment. *See Floyd v. C.B. Askins & Co.*, 382 S.C. 84, 90, 675 S.E.2d 450, 453 (Ct. App. 2009) (addressing whether an award made pursuant to § 42-9-10(C) survives death from an unrelated cause and noting that "[c]laimants suffering catastrophic injuries like Claimant's may require specialized healthcare without the means to earn a wage . . .[, and] [t]he award of compensation for a claimant's life expectancy seems to recognize this reality."); *cf.* S.C. Code Ann. § 42-9-400(d) (Supp. 2011) ("As used in this section, 'permanent physical impairment' means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed.").

While other states have also adopted by legislative enactment an exception to the general compensation rule for permanent total disability, none of these states appear to utilize the "physical brain damage" terminology. Importantly, these exceptions to the general compensation rule hinge on the employee-claimant's ability to return to work. For example, the Virginia statute, permits lifetime benefits for "injury to the brain which is so severe as to render the employee-claimant permanently unemployable in gainful employment." Va. Code Ann. § 65.2-503(C). Likewise, the North Carolina statute on permanent total disability allows an employee-claimant to receive extended benefits over the 500-week limit

if he or she sustains a "[s]evere brain or closed head injury as evidenced by severe and permanent: [s]ensory or motor disturbances; [c]ommunication disturbances; [c]omplex integrated disturbances of cerebral function; or [n]eurological disorders" unless "the employer shows by a preponderance of the evidence *that the employee is capable of returning to suitable employment*." N.C. Gen. Stat. Ann. § 97-29(d)(3)(a.)–(d.) (emphasis added); s*ee also Dishmond v. Int'l Paper Co.*, 512 S.E.2d 771, 774 (N.C. Ct. App. 1999) (affirming the Commission's award of total permanent disability where there was competent evidence in the record that total disability was the consequence of the employee-claimant's brain injury and where the evidence indicated the employee-claimant "could no longer function in a work environment"); *Slizewski v. Int'l Seafood, Inc.*, 264 S.E.2d 810 (N.C. Ct. App. 1980) (finding the evidence supported a finding that claimant suffered permanent brain injury and was permanently unable to function in a work-related capacity).[9]

Bearing these states' treatment in mind, we interpret the inclusion of "physical brain damage" among the most serious injuries within the statutory exception to the 500 week cap on benefits as an indication that the legislature was contemplating a brain injury so severe that the person could not subsequently return to suitable gainful employment. *See Adams v. Texfi Indus.*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) ("In construing a statute, the Court looks to its language as a whole in light of its manifest purpose." (citing *Simmons v. City of Columbia*, 280 S.C. 163, 311 S.E.2d 732 (1984))); *Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 169, 14 S.E.2d 889, 894 (1941) ("While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning this, as all other rules, is subject to the prime object of ascertaining and giving effect to the legislative intention. In doing this, we are not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished." (quoting *State ex rel. Walker v. Sawyer*, 104 S.C. 342, 346, 88 S.E. 894, 895 (1916))). This interpretation is in harmony with the entire purpose of our workers' compensation regime and recognizes the other avenues of compensation available under the scheme for brain injuries that do not

[9] *See Adams v. Texfi Indus.*, 320 S.C. 213, 217, 464 S.E.2d 109, 112 (1995) ("The decisions of North Carolina courts interpreting that state's workers' compensation statute are entitled to weight because the South Carolina statute was fashioned after North Carolina's." (citation omitted)).

render the worker unemployable. *See Shealy v. Algernon Blair, Inc.*, 250 S.C. 106, 112, 156 S.E.2d 646, 649 (1967) ("The object of the act is to relieve an injured workman from the loss or impairment of his Capacity to earn wages."). Thus, only in cases of physical brain damage that are both permanent and severe would an employee-claimant be entitled to benefits for life.

The resolution of the question of whether an employee has sustained either a physical injury to the brain or physical brain damage gives rise to the coextensive question of what proof is required in these cases.[10] Respondents contend that the determination of whether Petitioner sustained "physical brain damage" in the instant case hinges on the fact that no objective measure, *i.e.* a CT or MRI scan, confirmed such damage.

To the contrary, Dr. Collings testified in his deposition that there are essentially three ways to determine whether a person has sustained physical brain damage: (1) CT or MRI scanning; (2) cognitive behavioral level of functioning; and (3) neuropsychological testing. Dr. Collings opined that the first two methods were inconclusive in this case. In addition, Dr. Collings concluded that there can be physical damage to the brain that does not appear on normal scans, and Dr. Moss was in a better position to assess Petitioner's brain damage based on the neuropsychological examination rather than his own in-office examination. In so concluding, Dr. Collings testified that neuropsychological testing was "the best information that would support that there's . . . significant change between this pre- and post-condition." Dr. Collings further testified that the neuropsychological report was an in-depth test that neurologists use to diagnose injuries to the brain, and neurologists "sort of view it just like we do the MRI scan." In light of this testimony, we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases.

Importantly, it is always incumbent on the employee-claimant to prove that he or she has sustained an injury by accident, and demonstrate that he or she is entitled to benefits. *See Clade v. Champion Labs.*, 330 S.C. at 11, 496 S.E.2d at 857 (citation omitted). The fact that the injury alleged is physical brain damage

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[10] Petitioner does not directly raise this question in his brief. However, Respondents argues vehemently that Petitioner has not proved his injuries "were so severe that he will require specialized healthcare over the remainder of his life expectancy."

under section 42-9-10(C) does not change the employee-claimant's ultimate burden of proving his or her injuries.[11]

CONCLUSION

Based on the foregoing, we reverse the court of appeals and remand this case to the Commission for a determination of MMI, permanency, and whether Petitioner's injury constitutes "physical brain damage" as contemplated by section 42-9-10(C) of the South Carolina Code, which would entitle him to workers' compensation benefits for life.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result in a separate opinion.

[11] We need not address the remaining issues on appeal, as our holding is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when determination of prior issue is dispositive).

JUSTICE PLEICONES: I concur in result. I agree with the majority that this case must be remanded to the Commission to clarify its holding regarding whether Petitioner's brain injury qualifies for lifetime benefits under S.C. Code Ann. § 42-9-10(C) (Supp. 2011). However, I write separately because I would not reach the question what constitutes severe brain damage for purposes of § 42-9-10. Rather, I would wait until a case is before us for review of a Commission decision addressing it. I would then defer to the agency interpretation of the statute, if reasonable. *See CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.").

I also note that the language of other states' statutes cannot guide our interpretation of different language adopted by the General Assembly. Even to the extent we give great weight to North Carolina courts' interpretation of its workers' compensation act, this is true only when the courts deal with identical statutory language. *See Flemon v. Dickert-Keowee, Inc.*, 259 S.C. 99, 102, 190 S.E.2d 751, 752 (1972) ("At [the] time [the cited North Carolina case was decided] the pertinent provisions of the North Carolina Act were identical with the Code sections hereinabove quoted from our Act.").

Thus, I concur in result.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Arcadia Lakes, Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Thomas Hutto Utsey, Tony Sinclair, Aaron Small, Bette Small, Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown, Appellants,

v.

South Carolina Department of Health and Environmental Control and Roper Pond, LLC, Respondents.

Appellate Case No. 2010-159446

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 5095
Heard May 8, 2012 – Filed March 6, 2013

AFFIRMED

Amy E. Armstrong, of South Carolina Environmental Law Project, of Georgetown, for Appellants.

W. Thomas Lavender, Jr., and Joan W. Hartley of Nexsen Pruet, LLC, both of Columbia, for Respondent Roper Pond, LLC; Roger Page Hall and Stephen Philip Hightower, both of Columbia, for Respondent SCDHEC.

THOMAS, J.: The Town of Arcadia Lakes (Town) and various individuals appeal a decision by the Administrative Law Court (ALC) upholding the authorization by the South Carolina Department of Health and Environmental Control (DHEC) of coverage for certain land-disturbing activities under a State General Permit. We affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Roper Pond, LLC (Roper) is the owner and developer of 12.75 acres of real property on Trenholm Road in an unincorporated area of Richland County. The property includes 1.8 acres consisting of wetlands and waters that were identified by the United States Army Corps of Engineers (Corps) in 2005 as falling under the jurisdiction of the Federal Clean Water Act (CWA).[1] These jurisdictional wetlands include Roper Pond, a man-made pond that is visible from Trenholm Road but wholly within the boundaries of Roper's property. Before implementation of the project at issue in this appeal, water lilies covered the surface of Roper Pond.

Roper Pond drains through a pipe that runs beneath Trenholm Road and into Cary Lake. Cary Lake is privately owned by the Cary Lake Homeowners Association, which is not a party to this litigation. Although Cary Lake lies partly within the boundaries of the Town, the Town has no ownership interest in it and is not responsible for its maintenance or remediation.

In August 2007, Roper submitted to the Corps its initial plans for a multifamily apartment development to be built on its property. As part of this undertaking, Roper needed a permit for stormwater discharges from land-disturbing activities associated with the project. *See* S.C. Code Ann. § 48-14-30(A) (2008) (prohibiting land-disturbing activities without the submission of a stormwater management and sediment control plan to the appropriate agency and a permit to proceed with these activities); 9 S.C. Code Ann. Regs. 72-305 (Supp. 2012) (stating similar prohibitions to section 48-14-30(A) and setting out the permit application and approval process).

[1] 33 U.S.C. §§ 1251 *et seq.* (2006).

To expedite matters, Roper could "seek coverage under a promulgated storm water general permit" instead of obtaining an individual permit. *See* 3 S.C. Code Ann. Regs. 61-9.122.26(c)(1) (2012) ("Dischargers of storm water associated with industrial activity and with small construction activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit."). Under 3 S.C. Code Ann. Regs. 61-9.122.28 (2012), DHEC is authorized to issue general permits for stormwater discharges from projects that meet certain criteria. Pursuant to this authority, DHEC issued Permit Number SCR100000 (State General Permit) on August 1, 2006. The State General Permit, which DHEC described as an "NPDES General Permit for Storm Water Discharges from Large and Small Construction"[2] covered discharges from the commencement of an authorized project until final stabilization of the construction site.

In 2006, DHEC published a Guidance Document for the State General Permit advising prospective permittees about the need to obtain necessary permits from the Corps. In this particular case, Roper was required under section 404 of the CWA to obtain a wetlands permit from the Corps because it intended to fill some of the jurisdictional wetlands on the project site. *See* 33 U.S.C. § 1344(a) (2006) (authorizing the Corps to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites").

Under section 404(e) of the CWA, the Secretary of the Army is authorized to issue Nationwide Permits (NWPs) for any category of similar activities involving discharges of dredged or fill material determined to "cause only minimal adverse environmental effects when performed separately" and to "have only minimal cumulative adverse effect [sic] on the environment." 33 U.S.C. § 1344(e)(1) (2006). If a proposed activity meets the applicable regional and general conditions for an NWP, application for its authorization can proceed more quickly than it would if the applicant sought an individual permit. On March 12, 2007, the Corps issued NWP 29 and NWP 39, the two NWPs at issue in the present litigation. NWP 29 applied to residential developments, and NWP 39 applied to commercial and institutional developments.

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[2] As authorized by the Clean Water Act, the National Pollutant Discharge Elimination System (NPDES) Permit Program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. The program is administered by authorized states, including South Carolina.

The requirement for a 404 permit from the Corps in turn triggers a requirement under section 401 of the Clean Water Act for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 certification). 401 certification is required "from the State in which the discharge originates or will originate." 33 U.S.C. § 1341(a)(1) (2006).[3] On May 11, 2007, pursuant to its regulatory authority, DHEC issued 401 certifications for projects covered under NWP 29 and NWP 39.[4] DHEC 401 certifications for all NWPs included general conditions that a given project must meet, including the requirement that DHEC, in reviewing a project for which coverage under an NWP is sought, would consider not only the land area directly impacted by each NWP request, but also impacts to adjacent water bodies or wetlands resulting from the activity.

On April 30, 2008, George Whatley, a wetland scientist for BP Barber, submitted a joint federal and state application for the proposed construction project on Roper's property. On the application, Whatley noted the project would involve the filling of 0.075 acres of jurisdictional wetlands.[5] On May 5, 2008, Whatley submitted a

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[3] DHEC regulations reference this requirement as well. *See* 8 S.C. Ann. Regs. 61-101.A.2 (2012) (stating federal law requires an applicant for a federal permit to conduct an activity that "during construction or operation may result in any discharge to navigable waters" "to first obtain a certification from [DHEC]" and stating that "Federal law provides that no Federal license or permit is to be granted until such certification is obtained").

[4] *See* 8 S.C. Code Ann. Regs. 61-101.A.3 (2012) ("[DHEC] may issue, deny, or revoke general certifications for categories of activities or for activities specific in Federal nationwide or general dredge and fill permits pursuant to Federal law or regulations."); 33 C.F.R. § 330.4(c)(1) (2013) ("State 401 water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.").

[5] As noted earlier, the CWA requires a 404 permit for certain discharges of dredged or fill material into navigable waters. The term "navigable waters" is defined in the CWA as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). The United States Supreme Court has imposed limitations on the inclusion of wetlands, holding that "*only* those wetlands with a

pre-construction notification (PCN) to the Corps. In the PCN, Whatley noted that (1) although Roper initially advised the Corps in 2007 that the project would impact 0.099 acres of jurisdictional wetlands, the project was redesigned to reduce impacts to 0.075 acres and (2) "best management practices" (BMPs) would be implemented to ensure that construction activities would not impact jurisdictional areas lying outside the permitted impact areas. Whatley further requested that the Corps review the project for possible coverage under an NWP; however, he did not specify any particular NWP under which the activity would be conducted.

No other impacts to water quality were disclosed on the application; however, according to subsequent e-mails between BP Barber and the Corps, Whatley notified the Corps that the project included lowering the elevation of Roper Pond and the discharge of the soil and sediment from the bottom of the pond into an upland area. According to the e-mails, Whatley inquired whether either of these was an impact to be considered in obtaining approval for the construction, and the Corps advised that (1) lowering the pond was not an impact and (2) excavation of the pond would be exempt from permitting requirements provided the excavated material was "placed in a truck or deposited onto uplands" and there was "[n]o double handling or stockpiling in jurisdictional areas."

Pursuant to the requirements for coverage under the State General Permit, a Stormwater Pollution Prevention Plan (SWPPP) was prepared for the project on June 26, 2008. DHEC reviewed the SWPPP and requested certain revisions.

By letter dated September 9, 2008, the Corps advised Whatley that (1) it reviewed the PCN and determined the proposed activity would "result in minimal individual and cumulative adverse environmental effects and [was] not contrary to public interest," (2) the activity met the terms and conditions of NWP 39, and (3) for authorization to remain valid, the project had to comply with general conditions of the NWP, regional conditions, and certain special conditions, namely, that Roper obtain and provide the Corps with "all appropriate state certifications and/or authorizations (i.e. 401 Water Quality Certification, Coastal Zone Management

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continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]." *Rapanos v. U.S.*, 547 U.S. 715, 742 (2006) (emphasis in original). In the present case, there was no dispute that the 0.075 acres of wetlands to be filled in conjunction with Roper's proposed project were "jurisdictional wetlands" subject to the CWA.

Consistency Determination, State Navigable Waters Permit)." Consistent with its usual practice, the Corps sent a copy of the September 9, 2008 letter to DHEC as well as to Whatley.

On September 24, 2008, Roper submitted to DHEC a notice of intent (NOI) to discharge storm water associated with its proposed project, now designated as Roper Pond Apartments, seeking approval from DHEC to have the stormwater discharges covered under the State General Permit.[6] According to the NOI, the project site was 12.8 acres, of which 9.9 acres would be disturbed by land-clearing activities.

DHEC responded to Whatley by letter dated October 2, 2008, advising it determined that the impacts of the project on water quality would be minimal and that the proposed work would be consistent with the 401 certification issued in 2007 for NWP 39, subject to various conditions not at issue in this appeal.

On November 17, 2008, DHEC staff engineer Jill Stewart e-mailed BP Barber to express various concerns. Among these concerns was information she received that the proposed plans for Roper Pond Apartments included lowering of the water surface elevation of Roper Pond to allow for detention of post-development runoff of stormwater. Stewart inquired whether the dropping of the water surface elevation should be taken into account in determining if a site is eligible for coverage under NWP 39. BP Barber responded the following day, informing Stewart that its wetlands consultant advised "the lowering of the water surface elevation is included and covered under [NWP 39]."

In December 2008, DHEC issued a letter acknowledging it was satisfied that the revised SWPPP met the requirements of the State General Permit and the applicable regulations. On December 15, 2008, DHEC staff granted Roper coverage under the State General Permit for its stormwater discharges associated with construction of Roper Pond Apartments.

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[6] The NOI was on a DHEC form entitled "Notice of Intent (NOI) for Stormwater Discharges from Large and Small Construction Activities, NPDES General Permit SCR100000."

By letter dated December 30, 2008, Appellants and other individuals requested that the DHEC Board review and overturn the decision.[7] Among the technical issues raised in the letter were Roper's failure to disclose its intent to lower the elevation of Roper Pond and an allegation that it sought coverage under the wrong NWP. On January 14, 2009, DHEC responded to the letter, informing Appellants that the Board declined to conduct a final review conference and that anyone aggrieved by the decision could request a contested case hearing in the ALC. On February 16, 2009, Appellants filed a request for a contested case hearing in the ALC.

Meanwhile, on January 6, 2009, Whatley e-mailed the Corps requesting a corrected letter indicating the impacts of the project would be covered under NWP 29 instead of NWP 39. As noted earlier, Whatley also recounted Roper's plans to lower the elevation of Roper Pond and its intent to remove the excavated material to an upland area and his understanding that Roper did not need approval from the Corps for these activities. By letter to Whatley dated February 25, 2009, the Corps advised that it determined the proposed activity would result in minimal individual and cumulative adverse environmental effects, would not be contrary to the public interest, and met the terms and conditions of NWP 29. Except for the particular NWP referenced, the language in the February 25, 2009 letter was identical to the corresponding language in its September 9, 2008 letter.

As it did with the September 9, 2008 letter, the Corps sent a copy of its February 25, 2009 verification letter to DHEC. DHEC, however, did not issue another authorization letter advising Roper that the project would be consistent with the 401 certification issued in 2007 for NWP 29. According to Charles Hightower, DHEC's Section Manager of the 401 Wetlands Section, the purpose of such notification from DHEC is to provide an applicant assurance that the applicant's proposed project falls within the conditions of DHEC's 401 certification. Hightower further testified that Roper's proposed fill of the 0.075 acres of jurisdictional wetlands satisfied the necessary conditions to receive 401 water quality certifications for both NWP 29 and NWP 39 and that because the requisite conditions had been met, Roper did not need to notify DHEC before proceeding with the project under NWP 29.

On June 17, 2009, in response to a motion by Roper to dismiss Appellants' request for a contested case hearing, the ALC issued a consent order in which the parties

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[7] Additional facts about Appellants will be presented in the LAW/ANALYSIS section of this opinion.

agreed to the dismissal of all claims raised by Appellants challenging the 401 certification and authorization to conduct activities under NWP 39 for the proposed development. The partial dismissal did not affect Appellants' claims and Roper's defenses in connection with the 401 certification and authorization under NWP 29 .

The contested case hearing before the ALC took place on September 3 and 4, 2009. Stewart, Hightower, Whatley, and several individual Appellants testified. The record on appeal also includes depositions from various individuals, including Stewart and Hightower. In addition, Appellants called Seth Reice, Ph.D., a professor of ecology and biology at the University of North Carolina at Chapel Hill, as an expert on aquatic ecology. Although Reice admitted he previously opined that the proposed excavation of the Pond would have disastrous consequences, he now admitted this was only conjecture. Furthermore, Reice's primary interest was sedimentation, and he admitted he had no direct experience with excavation. When asked if he believed the land-disturbing activities conducted in conjunction with Roper Pond Apartments would have an adverse impact on Roper Pond, Reice stated only that "[i]t doesn't sound good" and he would "be surprised if they didn't," but declined to offer an expert opinion about the probable results. On cross-examination, Reice also stated he was not provided copies of Roper's SWPPP and except for what he heard at the hearing, had no knowledge of the BMPs that Roper intended to follow in order to minimize the impact of its construction activities.

On January 21, 2010, the ALC issued a final order upholding DHEC's approval of coverage under the State General Permit on the merits and further finding that Appellants lacked standing to challenge DHEC's decision. On March 23, 2010, following a hearing on a motion for stay by Appellants, the ALC temporarily stayed its final order pending a decision on Appellants' motion for reconsideration.

By order dated April 1, 2010, the ALC denied Appellants' motion to reconsider and lifted the temporary stay. Appellants then filed their notice of appeal to this court.

ISSUES[8]

I. Did the ALC err in finding Appellants lacked standing to challenge DHEC's decision to authorize coverage for Roper Pond Apartments under the State General Permit?

II. Did the ALC err in holding the 401 certification issued by DHEC was sufficient for a valid 404 permit and coverage under the State General Permit?

III. Did the ALC err in holding that Roper's proposed stormwater control activities could be covered under the State General Permit?

STANDARD OF REVIEW

The standard of review that an appellate court is to apply to appeals from the ALC is set forth in the South Carolina Administrative Procedures Act (APA), specifically in section 1-23-610 of the South Carolina Code (Supp. 2012). *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191 191, 194 (2012). Under section 1-23-610(B), a reviewing court may reverse or modify a decision by the ALC if the substantive rights of the appellant have been prejudiced because of a finding, conclusion, or decision that (1) violates constitutional or statutory provisions, (2) exceeds the agency's statutory authority, (3) is made upon unlawful procedure, (4) is affected by other error of law, (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) is arbitrary, capricious, or characterized by either abuse of

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[8] The Home Builders Association of South Carolina has filed an *amicus curiae* brief asserting that Appellants seek to add an unnecessary step in stormwater regulation and nationwide permitting that would have adverse consequences for the construction industry, the housing market, and the public at large and that existing programs and regulations sufficiently protect the public interest in the permitting process. Because our rulings on the issues Appellants have presented are dispositive of this appeal, we decline to address these policy concerns. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when its disposition of a prior issue is dispositive of the appeal).

discretion or clearly unwarranted exercise of discretion. Section 1-23-610 has been applied not only to findings by the ALC on the merits of a controversy but also to findings by the ALC concerning a party's standing to maintain an action. *See Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 4-8, 693 S.E.2d 426, 428-30 (Ct. App. 2010) (referencing only the APA in stating the standard of review, but ultimately affirming the ALC on the ground that appellant lacked standing and declining to address appellant's remaining arguments), *cert. denied* (July 7, 2011).

LAW/ANALYSIS

I. Standing

Appellants in this case are (1) the Town, (2) various residents of Kaminer Station, a subdivision adjacent to and uphill from Roper Pond (Kaminer Station Appellants),[9] and (3) various individuals whose properties border Cary Lake (Cary Lake Appellants).[10] The ALC found none of these groups had standing to maintain this action. We agree.

In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001), the Supreme Court of South Carolina, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), set forth three requirements that must be met to satisfy "the irreducible constitutional minimum of standing":

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and

[9] The Kaminer Station Appellants are Robert L. Jackson, Linda Z. Jackson, Robert E. Williams, Barbara S. Williams, Elizabeth M. Walker, Louis E. Spradlin, Mary Helen Spradlin, Thomas Hutto Utsey, Toney Sinclair, Aaron Small, and Bette Small.

[10] The Cary Lake Appellants are Gene F. Starr, M.D., Elaine J. Starr, Sanford T. Marcus, Ruth L. Marcus, and Steven Brown.

> the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

(Citations omitted).

"The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Sea Pine*s, 345 S.C. at 601, 550 S.E.2d at 291. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to withstand a motion to dismiss. *Lujan*, 504 U.S. at 561. Elements of standing, however, "are not mere pleading requirements but rather an indispensable part of the plaintiff's case"; therefore, "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stage of the litigation." *Id.* (*quoted in Beaufort Cnty. v. Trask*, 349 S.C. 522, 528 n.14, 563 S.E.2d 660, 663 n.14 (Ct. App. 2002)).

A. The Town

The ALC found the Town did not satisfy the first element required to establish standing, namely, that it had a personal stake in the litigation. Quoting *Glaze v. Grooms*, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996), the ALC referenced the general rule that "a municipality must allege an infringement of its own proprietary interests or statutory rights to establish standing." In response to this statement, Appellants advocate a broad interpretation of the term "proprietary interest" in determining whether the Town has demonstrated an injury in fact sufficient to confer standing. In the present case, Appellants argue "proprietary interests" include (1) the Town's interest in protecting the environmental quality of Cary Lake, which lies partly within the Town borders, (2) the Town's ability to comply with federal law, such as NPDES regulations, (3) the Town's interest in maintaining its character and desirable attributes, including its aesthetic appeal, and (4) the diminution of property values within the Town and other adverse effects of a nearby apartment complex on such concerns as security and traffic congestion. We hold that none of these professed interests, whether "proprietary" or not, are sufficient to confer standing on the Town in this case.

As to the first two concerns, Town Mayor Richard Thomas testified in a deposition that the Town had no ownership interest in Cary Lake. Mayor Thomas gave a brief statement that under NPDES regulations, the Town was responsible for water that flowed out of Cary Lake, but provided no supporting authority for this assertion.[11] Moreover, he acknowledged the Town is not responsible for the maintenance of Cary Lake, has never allocated funds for this purpose, and has never incurred any fines under NPDES regulations despite alleged problems in the past with water flowing into Cary Lake. He also stated that Cary Lake is the "bottom lake," that is, the final lake into which the remaining six lakes flow. We also find significant the absence of any evidence from Appellants that the BMPs to be implemented under the SWPPP were inadequate to prevent sediment from leaving the construction site; thus, Appellants have also failed to show their alleged injuries are "fairly traceable" to the challenged action in this case. Similarly, Appellants have not shown any causal connection between the authorization of coverage to Roper for land-disturbing activities under the State General Permit and either of their two remaining concerns. Therefore, pursuant to section 1-23-610, we affirm the ALC's determination that the Town lacks standing.

B. Kaminer Station Appellants

The ALC found the Kaminer Station Appellants failed to establish either an injury in fact from the permitting decision or a causal connection between the challenged decision and their alleged injuries. We agree with the ALC to the extent that it found that Appellants have failed to establish any injury that would be traceable to the permitting decision.

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[11] In their reply brief, Appellants cite title 33, section 1342(p) of the United States Code (2006), which the United States Congress added to the CWA in 1987. This section covers municipal and industrial stormwater discharges. Under paragraph (4) of this section, the Administrator of the Environmental Protection Agency is required to establish regulations setting forth permit application requirements for discharges from municipal separate stormwater systems and either the Administrator or appropriate State agency would eventually acquire the authority to issue and deny such permits. We have found nothing in this section either requiring a municipality to obtain a permit for stormwater discharges from a stormwater system that is already covered by a permit or holding a municipality responsible for such discharges.

Linda Jackson, one of the Kaminer Station Appellants, conceded that "water flows down" and there was no serious concern that stormwater from Roper Pond would flow uphill to Kaminer Station. However, Jackson also described the visual appeal of Roper Pond and her appreciation of the nature sounds in the area. She also testified that she had fished on Cary Lake and had seen changes for the worse in that area as it developed. Such observations, even if shared by many others, arguably can still form the basis for a concrete and particularized injury that would confer standing. *See Pye v. U.S.*, 269 F.3d 459, 469 (4th Cir. 2001) ("[M]erely because an injury is widely held does not necessarily render it abstract and thus not judicially cognizable. . . . So long as the plaintiff himself has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Moreover, even those concerns reflecting aesthetic or recreational interests have been recognized as "judicially cognizable injur[ies] in fact." *Sea Pines*, 345 S.C. at 602, 550 S.E.2d at 292. Nonetheless, when such interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed. *Cf. Conservation Council of N.C. v. Costanzo*, 505 F.2d 498, 501-02 (4th Cir. 1974) (stating the plaintiffs' recreational use of privately owned property as either licensees or trespassers did not confer standing to challenge development on that property because there was no evidence that the owner of the property would allow such use to continue in the future). Here, the affected bodies of water, Roper Pond and Cary Lake, are privately owned by parties other than Appellants.

Furthermore, we hold substantial evidence supports the ALC's determination that the Kaminer Station Appellants have not established a causal connection between their alleged injuries and the conduct giving rise to their complaint. When Roper's attorney asked Jackson to explain the injuries she would suffer if the land-disturbing activities for which coverage under the State General Permit was granted were managed properly, she responded only that "we don't know how it's going to be managed." Jackson also conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves. Furthermore, Reice's inability to offer a definitive opinion about the impact of the dredging of the pond supports the ALC's finding that the Kaminer Station Appellants have failed to meet the second requirement for standing.

C. Cary Lake Appellants

Finally, we agree with the ALC that the Cary Lake Appellants failed to show that granting coverage for Roper Pond Apartments under the State General Permit would cause an actual or imminent injury and therefore lacked standing to challenge DHEC's decision to grant coverage under the State General Permit.

Testifying for the Cary Lake Appellants, Elaine Starr stated her home, where she has lived since 1971, borders Cary Lake, which is on the opposite side of Trenholm Road from Roper Pond. She further testified that she had a bachelor's degree in biology and had done graduate work in wetlands and coastal resources. She had participated in several organizations that were concerned with water quality, and she and her family have made extensive use of Cary Lake for recreational purposes. Starr testified about her empirical observations of the decline in the water quality of Cary Lake and how these observations were supported by her use of a Secchi disk, a technique to measure water clarity. She also expressed concerns about the possible demise of the water lilies due to the dredging of Roper Pond, noting "if their [rhizomes] or root systems get damaged or taken way, . . . they may not be there."

According to Starr, the increased sedimentation in Cary Lake that she described resulted from prior occurrences involving possible mismanagement. However, there was no evidence that the project at issue here would lead to similar results. Starr admitted she had not reviewed the SWPPP for the proposed project and was unable to offer any specific challenge to DHEC's determination that the SWPPP was not, under the terms of the State General Permit, a sufficient precaution against the consequences she claimed would result from the building of Roper Pond Apartments. Finally, similar to what we noted in our discussion about the Kaminer Station Appellants, the complaints of the Cary Lake Appellants primarily concern Roper Pond and Cary Lake, both of which are privately owned and maintained by parties other than Appellants, and are thus not injuries in fact. We therefore agree with the ALC that the Cary Lake Appellants presented at best only speculative evidence that they would suffer an injury in fact from DHEC's decision to allow Roper Pond Apartments to be covered under the State General Permit.

II. Validity of the 401 Certification

Appellants further argue the 401 certification issued by DHEC was insufficient to satisfy the requirements Roper needed to fulfill to obtain a 404 permit because (1) the 401 certifications that DHEC issued for projects authorized under NWP 29 or NWP 39 could not apply to the excavation of the pond because that activity was not disclosed when Roper applied to the Corps for a 404 permit, (2) the project did not comply with certain general conditions applicable to all NWPs, specifically that DHEC consider the impacts to all land within a project boundary and to adjacent bodies of water or wetlands, (3) DHEC never issued a formal certification that the project met the conditions under NWP 29 for water quality certification, and (4) DHEC failed to conduct the required review for compliance with certain water quality regulations. We hold none of these allegations warrant reversal of the ALC's finding that Roper had an effective 401 certification for its proposed project.

First, although Roper did not initially inform the Corps that it intended to dredge and excavate the pond as part of the project, as of January 6, 2009, when Whatley requested a corrected letter from the Corps indicating that the impacts of the project would be covered under NWP 29 instead of NWP 39, the Corps had been informed that such an activity was to be part of the project. Having received this information, the Corps nevertheless determined that the project would result in "minimal individual and cumulative environmental effects" and met the conditions of NWP 29.

As to Appellants' second argument, we agree with their position that the general conditions for water quality certification require DHEC to review the "overall project proposed by a single owner/developer," "includes all land within the project bound under single ownership," and is not confined to "the land area directly impacted by each NWP request" and their assertion that no one at DHEC undertook a complete examination of the impact of the project on all waters and wetlands at the project site or determined if feasible alternatives were available. Here, however, 401 certification was necessary only as a prerequisite to obtaining a 404 permit from the Corps for filling the jurisdictional wetlands. This requirement was pursuant to 33 U.S.C. section 1341(a)(1) (2006), which states in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction

> or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, . . . that any such discharge will comply with the applicable provisions . . . .

(emphasis added). Appellants have emphasized they never argued that a 404 permit was necessary to dredge and excavate the pond, and there was no contention here that this activity would result in a discharge into a navigable water. Furthermore, we have found no argument from Appellants to the effect that the alterations to the pond were an impact resulting from the filling of the jurisdictional wetlands, the activity for which a 404 permit was sought.

Based on our interpretation of the events in this case, we disagree with Appellants' third argument, their assertion that the project never received a proper water quality certification for coverage under NWP 29. We acknowledge Hightower admitted that after DHEC received notice from the Corps that the project would be covered under NWP 29, it did not issue a letter advising Roper that the project would be consistent with the 401 certification it issued for this NWP and agreed that sending such a letter would have been advisable; however, he also testified that an authorization letter was only a formality for the applicant's benefit and was not required by the State General Permit. The Corps verified that Roper's proposed work was eligible for coverage under NWP 29, and DHEC, consistent with its regulatory authority, had already issued a 401 certification for projects covered under NWP 29. A follow-up letter would have served only as documentation of this certification, and the absence of such a letter does not mean DHEC failed to issue a water quality certification for the project.

Finally, Appellants have challenged the water quality certification on the ground that DHEC failed to review the project to determine (1) whether it complied with 6 S.C. Code Ann. Regs. 61-68 (2012) and 8 S.C. Code Ann. Regs. 61-101 (2012), both of which were promulgated pursuant to the South Carolina Pollution Control Act, and (2) the impact of the draining and excavation of Roper Pond. They further argue the ALC erroneously relied on *Responsible Economic Development v. South Carolina Department of Health and Environmental Control*, 371 S.C. 547, 552-53, 641 S.E.2d 425, 428 (2007), for the proposition that "a stormwater permit issued pursuant to the Stormwater Act cannot be denied based on the regulations of the Pollution Control Act." We need not determine whether the ALC correctly

applied this holding. We have already determined that the Corps was aware that Roper intended to excavate the pond when it authorized coverage under NWP 29 and that the 401 certification that DHEC issued for this NWP 29 satisfied the water quality certification requirement for a 404 permit.

III. Coverage Under the State General Permit

Finally, Appellants take issue with the finding that Roper was entitled to coverage under the State General Permit. They submit two arguments in support of their position. We reject both arguments.

First, Appellants reiterate their previous argument that Roper was not entitled to coverage because the 401 certification was inadequate for a 404 permit, which in turn was a prerequisite for coverage under the State General Permit. We have already determined that the 401 certification that DHEC issued was sufficient for Roper to obtain coverage under NWP 29.

Appellants further contend that the excavation of the pond and lowering of its surface would make the pond a water control structure and would therefore require, under the terms of the State General Permit, a 404 permit from the Corps, which in turn would require a 401 certification. The ALC did not specifically address the question of whether the use of the pond as a water control structure required a 404 permit, and Appellants did not request a ruling in their motion to reconsider. The issue, then, has not been preserved for appellate review, and it would be improper for us to address it now. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding an issue was not preserved for appeal because the trial judge's general ruling was insufficient to preserve the specific issue for appellate review and the appellant did not move to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 218, 464 S.E.2d 112, 113 (1995) (vacating an opinion by this court "to the extent it addressed an issue which was not preserved").

CONCLUSION

We agree with the ALC that none of the Appellants had standing to maintain their challenge to the authorization of coverage for Roper Pond Apartments under the State General Permit. As to the merits of Appellants' arguments, we affirm the ALC's ruling that Roper is entitled to this coverage.

AFFIRMED.

WILLLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Rose Barber, Respondent,

v.

Daryl Scott Barber, as Personal Representative of the Estate of Robert Donald Barber, Appellant.

Appellate Case No. 2010-164206

Appeal From Richland County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. Op. 5096
Heard March 4, 2013 – Filed March 6, 2013

AFFIRMED

Timothy G. Quinn, of Quinn & Mason, LLC, of Columbia, for Appellant.

James W. Corley, of Columbia, for Respondent.

CURETON, A.J.: Husband's estate appeals from the final order of the family court granting Wife a divorce, equitably dividing the parties' property, and

awarding alimony to Wife. Husband argues the family court erred in awarding Wife the benefit of his survivor's benefit plans.[1] We affirm.

FACTS

In 1996, after more than twenty years of marriage, the parties separated. In 1999, the family court in Lexington County entered a consent order establishing Husband's obligations to (1) pay Wife "$1,300 monthly as unallocated support," (2) provide her with medical and dental insurance, and (3) maintain "all existing life insurance policies and survivor's benefits."

No further legal action occurred until 2009, when Wife brought an action in the family court in Richland County. Husband answered Wife's Amended Complaint in that action, moved to dismiss, and counterclaimed. In his counterclaim, Husband acknowledged Wife "should be entitled to an equitable distribution of both his military and civil service pensions."

In its Final Decree and Order on February 18, 2010, the family court ordered Husband to allocate to Wife fifty percent of the benefit earned from his retirement plans during the marriage. The family court stated Wife "may elect to waive the Survivor Benefits Coverage."

Husband died while this appeal was pending. His estate was substituted for him as a party to this appeal.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011).

[1] Husband identified five issues on appeal. We address only the question of the survivor's benefit plans because, at oral argument, he conceded the remaining four issues.

LAW/ANALYSIS

Husband asserts the family court erred in awarding the benefit of his survivor's benefit plans to Wife. We disagree.

With regard to military retirement benefits, a person who is required by a court order in a divorce proceeding to provide survivor's benefit coverage to a former spouse and who makes such an election may not change that election except through another court order that modifies the election provision of the first order. 10 U.S.C.A. § 1450 (2010). Similarly, survivor's benefits in a civil service retirement plan are subject to "the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree." 5 U.S.C.A. § 8341(h) (2007).

Husband argues that, while the family court had authority to make an equitable division of his retirement plans, it lacked jurisdiction over his election of a beneficiary for his survivor's benefit plans. *See Brown v. Brown*, 279 S.C. 116, 119, 302 S.E.2d 860, 861 (1983) (finding the federal law in effect at that time deprived the family court of jurisdiction over federal survivor's benefit plans and required reversal of family court's requirement that military retiree elect his former wife as the beneficiary of his survivor's benefits), *overruled on other grounds by Tiffault v. Tiffault*, 303 S.C. 391, 392, 401 S.E.2d 157, 158 (1991). Therefore, he reasons, the family court erred in ordering him to maintain Wife as the beneficiary of his survivor's benefit plans.[2]

We recognize the preemptive effect of federal law. *See Weston v. Kim's Dollar Store*, 385 S.C. 520, 525-26, 684 S.E.2d 769, 772 (Ct. App. 2009) (reciting the supremacy of federal law over state law and acknowledging state law that conflicts with federal law has no effect), *aff'd and remanded*, 399 S.C. 303, 731 S.E.2d 864 (2012). Clearly, our state courts are bound by federal laws applicable to military and civil service retirement plans. Moreover, those laws do not expressly prohibit a family court from ordering a divorcing party to maintain survivor's benefit coverage for a former spouse. On the contrary, the language of the governing

[2] According to counsel, Husband desired to make his young son, who was born to Husband and a third party, the beneficiary of his survivor's benefit plans.

statutes expressly permits court-ordered designation of beneficiaries. *See* 10 U.S.C.A. § 1450; 5 U.S.C.A. § 8341(h). Accordingly, we find federal law did not deprive the family court of jurisdiction to order the designation of Wife as the beneficiary of Husband's survivor's benefit plans.

We do not reach Husband's remaining issues on appeal. At oral argument, the parties agreed Husband's death had rendered those issues moot.

CONCLUSION

We find the federal law governing military and civil service retirement plans does not deprive a family court of jurisdiction to order a divorcing party to maintain survivor's benefit coverage for his former spouse. Consequently, the decision of the family court is

AFFIRMED.

FEW, C.J., and LOCKEMY, J., concur.

The South Carolina Court of Appeals

State of South Carolina, Plaintiff,

v.

Francisco Guerrero-Flores, Defendant.

Appellate Case No. 2012-212046

ORDER

Francisco Guerrero-Flores has been indicted on drug charges and is awaiting trial. He filed a motion to suppress the contents of phone calls intercepted pursuant to section 17-30-110 of the South Carolina Code (Supp. 2012), a part of the South Carolina Homeland Security Act. *See* S.C. Code Ann. §§ 17-30-10 to -145 (Supp. 2012). Sections 17-30-110 and 17-30-15 require that this court hear the motion to suppress. *See* § 17-30-110(A) (requiring motions to suppress the contents of intercepted wire or oral communications be made to the "reviewing authority"); § 17-30-15(9) (defining "[r]eviewing authority" as "a panel of three judges of the South Carolina Court of Appeals"). Guerrero-Flores raises two arguments in support of suppression.[1] First, he contends the orders authorizing the interceptions violated subsection 17-30-80(D) because they authorized interception

[1] Guerrero-Flores raised additional arguments in his motion to suppress, which he conceded or withdrew at the suppression hearing. First, he argued the State failed to provide any evidence that it complied with the statutory requirements of the Homeland Security Act as to "Target Phone #3 and Target Phone #4." Guerrero-Flores conceded this issue at the suppression hearing. Additionally, Guerrero-Flores conceded his argument that a progress report for "Target Phone #5" was not in date compliance. Finally, Guerrero-Flores argued the order of authorization is insufficient on its face because it was issued based on information obtained through a "hand off" involving a criminal investigation in Tennessee. Guerrero-Flores withdrew this argument at the suppression hearing.

outside of the state of South Carolina. Second, he asserts the intercepted communications should be suppressed because neither the South Carolina Law Enforcement Division (SLED) nor an individual operating under a contract with SLED intercepted the communications as required under section 17-30-70. We deny the motion to suppress.

I. Facts

In September 2009, SLED, the Lexington County Sheriff's Department, and the United States Drug Enforcement Administration (DEA) began investigating a large heroin trafficking organization operating in Columbia and other parts of South Carolina. The organization used multiple cellular phones in the following manner: a purchaser would call one number to place an order, and the "dispatcher" would use a different phone to direct his "couriers" to the purchase location. Between March 5 and June 17, 2010, the Attorney General filed four applications in circuit court seeking authorization to intercept these communications. Each of the applications was based on an affidavit submitted by SLED agent Jack Rushing. The Honorable G. Thomas Cooper Jr. granted each application in a written order.

Based in part on communications intercepted pursuant to the orders, the State Grand Jury indicted Guerrero-Flores and several co-defendants for conspiracy, possession with intent to distribute, two counts of distribution, and several counts of trafficking, all related to heroin. This court held a hearing on Guerrero-Flores's motion in which we took testimony, received documentary evidence, and heard argument.

II. Interpretation of the Homeland Security Act

The Homeland Security Act is patterned after Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22 (2002) (Federal Act). *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). Because no South Carolina cases have addressed the issues Guerrero-Flores raises in his motion to suppress, we find that federal cases analyzing comparable provisions of the Federal Act are persuasive in interpreting the provisions of the Homeland Security Act applicable to this case. *See Whitner*, 399 S.C. at 553, 732 S.E.2d at 864 (explaining "we look to the federal courts' interpretations" of the Federal Act when interpreting comparable provisions of the Homeland Security Act).

III. Compliance with Subsection 17-30-80(D)

Subsection 17-30-80(D) provides that "the judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting . . . ." Guerrero-Flores contends Judge Cooper's orders do not comply with subsection 17-30-80(D) because they authorize interception of communications outside of the state of South Carolina. We find that each of the orders complies with the subsection because each authorizes interception of phone calls within South Carolina.

The interception of a phone call can occur in two locations—the place where the tapped phone is located and the place where law enforcement officers first overhear the phone call. *See United States v. Luong*, 471 F.3d 1107, 1109 (9th Cir. 2006) (stating "interception occurs where the tapped phone is located *and* where law enforcement officers first overhear the call"); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992) (providing interception occurs at the place where "the to-be-tapped telephone is located" and "at the place where the redirected contents are first heard"). Thus, pursuant to subsection 17-30-80(D), a judge has the power to order interception within South Carolina on the basis of either the phone being located in South Carolina or law enforcement officers listening to the call in South Carolina. In this case, we find the orders comply with subsection 17-30-80(D) for both reasons: (1) they are directed at phones located in South Carolina, and (2) they direct law enforcement officers to listen to the intercepted communications in real time in South Carolina.

First, the orders are directed at phones located in South Carolina. Although these are cellular phones, the applications and supporting affidavits set forth extensive facts demonstrating that the phone users were located in South Carolina. Notably, all but two of the phones had South Carolina area codes.[2] Further, the applications

[2] Two of the phones had 773 area codes and subscriber addresses in Irvine, California. The following facts, however, indicate these two phones were being used in South Carolina for the purpose of heroin trafficking. The State presented evidence that, according to Sprint Nextel, the California address is the default address Sprint uses if the subscriber does not provide one when activating the service. Additionally, the State provided the circuit court information from the Department of Motor Vehicles for one of the phone users, which indicated the user

and supporting affidavits provide details to support the fact that the phones were being used in South Carolina as an integral part of heroin trafficking occurring here. Therefore, the orders complied with subsection 17-30-80(D) because they authorized interception of phone calls made to and from phones located in South Carolina.

Second, the orders directed SLED to listen to the intercepted calls in South Carolina.[3] Each order contains the following language: "interception shall be conducted at the secure regional facility maintained by the DEA in Atlanta, Georgia, then routed to a secure listening post at the DEA office in Columbia, South Carolina (which is networked to the Atlanta, Georgia facility)." Thus, by requiring SLED agents to listen to the communications at "a secure listening post . . . in Columbia, South Carolina," the orders authorized the interception of the communications in South Carolina. *See Luong*, 471 F.3d at 1109 (providing "interception occurs . . . where law enforcement officers first overhear the call"). Accordingly, the orders comply with subsection 17-30-80(D).

Guerrero-Flores contends, however, the requirement that SLED use a DEA facility outside South Carolina violates subsection 17-30-80(D). We disagree. Guerrero-Flores focuses on the following language in each order: "interception shall be conducted at the secure regional facility maintained by the DEA in Atlanta, Georgia . . . ." While Guerrero-Flores is correct that this provision allows interception outside "the territorial jurisdiction of the court," he is not correct that this provision violates subsection 17-30-80(D). His argument ignores the remainder of the quoted sentence: ". . . then routed to a secure listening post at the DEA office in Columbia, South Carolina (which is networked to the Atlanta, Georgia facility)." As explained above, we hold this language complies with subsection 17-30-80(D) because it "authoriz[es] . . . interception . . . within the

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had a current South Carolina address. As to the other phone, the State provided the circuit court information showing that both phones were being used by the same person. Finally, the application indicated law enforcement officers physically located one of the phones at a residence in Lexington County using a global positioning system.

[3] We find it necessary to the resolution of this motion that we address this second reason the orders complied with subsection 17-30-80(D) because the evidence indicates that some of the phone calls were intercepted at a time when the cellular phones were not physically located in South Carolina.

territorial jurisdiction of the court." The mere fact that the order also authorizes interception in another state does not violate subsection 17-30-80(D). In fact, the State presented testimony of DEA telecommunication specialist Herman Jenkins indicating it is not practically possible for a law enforcement agency to intercept phone calls in South Carolina without using the DEA's regional intercept system facility in Atlanta. Jenkins explained that the DEA's Atlanta facility supports Georgia, South Carolina, North Carolina, and Tennessee. Therefore, all phone calls intercepted by law enforcement in those states are necessarily intercepted in Atlanta, in addition to the forum state.

Guerrero-Flores also argues that a two to three second delay in routing the calls to South Carolina requires a finding that the orders violated subsection 17-30-80(D). He argues that as a result of this brief delay, the calls were not intercepted in South Carolina because officers did not "first overhear" the calls here. *See Luong*, 471 F.3d at 1109 (providing "interception occurs . . . where law enforcement officers first overhear the call"). We disagree. Jenkins testified this delay in routing the calls from Atlanta to Columbia was a necessary consequence of the distance between the two cities, and that the technological limitations made the delay unavoidable. He also testified, although there was a slight delay, the calls were being broadcast to the Atlanta and Columbia offices in such a way that officers in both locations were listening to the communications in real time. In explaining how communications were received by both offices, Jenkins stated, "Whatever happen[ed] in Atlanta, w[ould] happen in Columbia . . . in real time."

Guerrero-Flores argues the use of the word "then" in the circuit court's orders, coupled with the necessary two to three second delay in routing the calls to South Carolina, indicates that the orders authorized calls to be intercepted only in Georgia because they were first heard there. His argument is based on a misreading of *Rodriguez* and *Luong*, and in particular the Second and Ninth Circuits' use of the phrases "first heard" and "first overhear."

In *Rodriguez*, the order authorizing the interception of phone calls was entered in the Southern District of New York, but four of the five phones to be tapped were located in New Jersey. 968 F.2d at 134. Because these phones were not located within the jurisdiction of the court that entered the order, the court did not have authority to enter the order based solely on the location of the phones. *Id.* at 134-35. Analyzing whether the order was nevertheless valid, the Second Circuit focused on the statutory definition of "interception." *Id.* at 135-36. The Federal

Act defines the term precisely as the Homeland Security Act defines "Intercept." *Compare* 18 U.S.C. § 2510(4) *with* S.C. Code Ann. § 17-30-15(3) (both defining "intercept" as "the aural or other acquisition of the contents of any wire . . . or oral communication"). The court reasoned that because "the definition of interception includes the 'aural' acquisition of the contents of the communication, the interception must also be considered to occur at the place where the redirected contents are first heard." 968 F.2d at 136.

Rodriguez is based on the location of "aural acquisition of the contents" of the calls, not on the specific timing of that event in one jurisdiction compared to its timing in another jurisdiction where interception might also have occurred. In *Rodriguez*, there was no need to address the significance of a delay between one listening location and another because the only place the calls were "first heard" was New York. *See* 968 F.2d at 135 (stating "[t]he order was entered on the government's representation . . . that *all* of the interception equipment for these five telephones would be . . . in the Southern District of New York" (emphasis added)).[4] The *Rodriguez* court used the term "first heard" to distinguish the situation in that case from one in which the calls were not listened to in real time in the forum state, but were initially listened to *only* in another state beyond the court's jurisdiction.

In *Luong*, the Ninth Circuit described the narrow issue before it as "whether this statute authorized the district court in the Northern District of California to

[4] Other courts have used phrases similar, if not identical, to "first heard." *See, e.g.*, *Luong*, 471 F.3d at 1109 (using the phrase "first overhear the call"); *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996) (using the phrase "original listening post"); *United States v. Tavarez*, 40 F.3d 1136, 1138 (10th Cir. 1994) (quoting *Rodriguez* for the phrase "first to be heard"). In each of those cases, however, there was only one listening place. *See Luong*, 471 F.3d at 1109 (stating "all of the intercepted conversations would 'first be heard in the Northern District of California[,]'" the forum); *Denman*, 100 F.3d at 401 (stating "the FBI intercepted, monitored, and recorded the calls . . . in Nacogdoches, Texas," within the forum); *Tavarez*, 40 F.3d at 1138 (stating the calls were listened to in Cleveland County, Oklahoma, the forum). None of those cases involved the simultaneous routing of the call to a distant jurisdiction causing a delay in the call being heard in the forum.

authorize interception of communications to and from a mobile phone . . . located outside of the court's territorial jurisdiction but the government's listening post was located within it." 471 F.3d at 1108. The defendants argued that interception could not occur "where the government sets up a listening post where it is first able to hear the intercepted conversation." *Id.* at 1109. Focusing as the Second Circuit did in *Rodriguez* on the statutory definition of "interception," and not on the timing of what happened in the forum as opposed to some other location, the Ninth Circuit upheld the interception, stating "interception occurs . . . where law enforcement officers first overhear the call." *Id.* Importantly, there was only one listening post in *Luong*. *See id.* (stating the government's "affidavit indicated that . . . all of the intercepted conversations would 'first be heard in the Northern District of California'"). Therefore, the phrase "first overhear" as used in *Luong* cannot be read to apply to the situation we face here—where officers listened to the conversations in real time in South Carolina, but there was a several second delay in routing the calls from the DEA post in Atlanta.

Thus, a several second delay between Atlanta and Columbia is immaterial because the reasoning of *Rodriquez* and *Luong* requires us to focus on the location of the "aural acquisition" of the call. In this case, because law enforcement officers listened in real time in both cities, "aural acquisition" occurred simultaneously in both places.[5] Therefore, under the reasoning of *Rodriguez* and *Luong*, the orders complied with subsection 17-30-80(D).

[5] One federal district court has been presented with a similar situation to this case. *See United States v. North*, No. 3:09CR92TSL–FKB, 2011 WL 653864 (S.D. Miss. Feb. 14, 2011). In *North*, the order authorizing the interception of phone calls from North's cell phone was entered in the Southern District of Mississippi. *Id.* at *1. North's cell phone was located outside of Mississippi, "the monitoring post was located in Louisiana, [and] a simultaneous feed and aural acquisition station was located in the wire room of the DEA's Jackson, Mississippi office in the Southern District of Mississippi, so that aural acquisition was occurring in both jurisdictions simultaneously[.]" *Id.* at *3. The *North* court stated that the statute would have authorized interception in Mississippi based on the simultaneous feed; however, "while agents in the Jackson office apparently had the *capability* to hear conversations at the same time as the agents manning the Louisiana monitoring post, this did not occur." *Id.* at *4.

IV. Compliance with Section 17-30-70

Subsections 17-30-70(A)(1) and (A)(3) provide that a "judge may grant . . . an order authorizing or approving the interception of wire, oral, or electronic communications by: [SLED] . . . or an individual operating under a contract with [SLED]" for the investigation of certain criminal offenses. Guerrero-Flores contends the orders were not carried out in compliance with section 17-30-70 because neither SLED nor an individual operating under a contract with SLED intercepted the communications. Because SLED listened to the phone calls in real time in South Carolina, we find that SLED intercepted them.[6] *See Luong*, 471 F.3d at 1109 (providing "interception occurs . . . where law enforcement officers first overhear the call"). Accordingly, we find that SLED complied with subsection 17-30-70(A)(1) in carrying out the orders.

V. Conclusion

Subsection 17-30-110(A) provides that "[i]f the reviewing authority does not unanimously determine that the order of authorization was issued and the communications were intercepted in conformity with the requirements of [the Homeland Security Act]," the contents of the calls and evidence derived from them were "obtained in violation of [the Act]." As we have explained, we unanimously find the orders were issued and the calls were intercepted in compliance with the Act. Accordingly, Guerrero-Flores's motion to suppress is denied.[7]

s/John Cannon Few C.J.

s/H. Bruce Williams J.

[6] Because we find that SLED intercepted the phone calls in compliance with subsection 17-30-70(A)(1), we need not address Guerrero-Flores's issue of whether the orders were carried out in compliance with subsection 17-30-70(A)(3).

[7] As to any issue raised concerning a violation of section 17-30-145, this court need not address it because Guerrero-Flores presented no evidence that SLED failed to provide the proper training for conducting the interception.

s/Daniel F. Pieper J.

Columbia, South Carolina
March 6, 2013